APPENDIX A

(Filed June 28, 1972.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1541 thru 71-1548

ROBERT M. KNUTH, on behalf of himself and on behalf of all other members of the class who are similarly situated,

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, WILLIAM COLTERYAHN & SONS, INC., KLEIN DAIRY, LINGERLIGHT DAIRY COMPANY, SCHNEIDER'S DAIRY, INC., SNEE DAIRY COMPANY, ERIE DAIRY LAND, INC., GOLDEN CROWN DAIRY, SCHRUER'S DAIRY, YAPLE'S DAIRY, INC., GOLDEN GLOW DAIRY, SEALTEST FOODS, DIVISION OF NATIONAL DAIRY PRODUCTS CORPORATION, HOWARD YOST, JOHN HANAS, RUSSELL RAYBUCK, MILTON CULBERTSON, DONALD TRISCUIT, RAYMOND BOYD, CALVIN HENRY, ROY BLACK, LOREN MITCHELL, CHARLES SPAID.

ROBERT M. KNUTH AND ROBERT W. BRYER and others similarly situated by their attorney, PAUL A. SIMMONS, Applicants in No. 71-1541.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, Appellant in No. 71-1542.

HOWARD YOST, Appellant in No. 71-1543.

WILLIAM COLTERYAHN & SONS, INC. Appellant in No. 71-1544.
LINGERLIGHT DAIRY COMPANY, Appellant in No. 71-1545.
ERIE DAIRY LAND, INC., Appellant in No. 71-1546.
GOLDEN GLOW DAIRY, Appellant in No. 71-1547.
YAPLE'S DAIRY, INC., Appellant in No. 71-1548.

(D.C. Civil Action No. 65-1328.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 17, 1972.

Before Adams, Gibbons and Rosenn, Circuit Judges.

GIBBONS, *Circuit Judge*

This case is before us for the second time. Originally it came before us on the appeal of the class representative (the plaintiff) from an order dismissing his complaint for failure to state a claim. The complaint was in three counts and the appeal challenged only the dismissal of Counts I and III. Count I alleged violations of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 and sought damages under section 4 of the Clayton Act, 15 U.S.C. § 15. Count III alleged a conversion under Pennsylvania law and claimed pendent jurisdiction. We held that the allegations of Count I, though confused and obscure, alleged a claim under § 4 of the Clayton Act sufficient to escape dismissal under Fed. R. Civ. P. 12(b)(6). We remanded with a direction that the court follow the procedures specified in Fed. R. Civ. P. 23(c) in determining whether a class action was properly involved, and if so, the proper ambit of the class.[1] We also held that the conversion count was within the district court's pendent jurisdiction. *Knuth* v. *Erie-Crawford Dairy Coop. Association*, 395 F.2d 420 (3d Cir. 1968).

Following the remand the district court caused notice to be mailed to 1200 Pennsylvania milk producers whom the plaintiff sought to represent. Approximately 900 of the 1200 opted out. Thereafter the case proceeded to trial before a jury on the issue of liability only. At the conclusion of the plaintiff's case the district court granted defendants' motion for a directed verdict on Count I and denied,

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[1] Hereinafter alternatively referred to as the plaintiffs and the producers.

except for two defendants, a similar motion on Count III. That count went to the jury at the end of defendants' case on written interrogatories which resulted in verdicts against each remaining defendant. Thereafter the district court granted motions for judgments notwithstanding the verdict in favor of several individual defendants. It also granted a motion for judgment notwithstanding the verdict in favor of all defendants contrary to jury interrogatory Number 8 on the issue whether the Pennsylvania six year statute of limitations had been tolled. It ruled that damages would be limited to those suffered by the class members who had elected against opting out of the class action. The district court certified that there was a controlling question of law the disposition of which would materially advance the ultimate termination of the litigation. We granted a petition for an interlocutory appeal. 28 U.S.C. § 1292(b). The plaintiff and those defendants against which a verdict was allowed to stand have appealed. The several appeals present a variety of issues.

The dispute arises out of the persistent and largely futile efforts of the Pennsylvania Milk Control Commission (the Commission) acting under a statutory mandate to insulate the Pennsylvania dairy industry from price competition.[1a] The plaintiffs-producers are dairy farmers whose herds produce milk in Erie and Crawford Counties in western Pennsylvania. The defendant Erie-Crawford Dairy Coop. Association (the Cooperative) is a non-profit agricultural cooperative marketing association organized under Pennsylvania law, of which the plaintiffs are member-stockholders. The producers, during the relevant period, entered into contracts with the Cooperative whereby each agreed to consign all milk and cream produced by him to the

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[1a] 31 Pa. Stat. Ann. § 700j-101 *et seq.* *See* Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939); Penn Dairies v. Milk Control Commission, 344 Pa. 635, 26 A.2d 431 (1942), *aff'd* 318 U.S. 261 (1943); Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15, 1 A.2d 775 (1938).

Cooperative for sale ". . . to such parties and by such methods as the Board of Directors shall deem to be to the best advantage of the Producer" (Exhibit 109, Article Third). Under the standard contract the Cooperative has the right to pool the proceeds of sale of milk or cream derived from all the producers. It then must pay each producer his share of the proceeds of sale ". . . after making all authorized deductions hereinafter provided for or authorized by law" (Exhibit 109, Article Third). The agreement provides for deduction from the proceeds of sale of amounts to cover statutory reserves, dividends on preferred or common stock, and ". . . all operating expenses including transportation, selling and processing costs . . ." (Exhibit 109, Article Fourth).

The individual defendants (the directors) are producers who served as directors of the Cooperative between the years 1957 and 1965. With the exception of Howard Yost none were officers of the Cooperative during those years. Two individual defendants made a successful motion for a directed verdict. The jury verdict found the remaining individual defendants liable for conversion, but with the exception of Yost all were granted judgment notwithstanding the verdict.

From 1957 through 1965 the Cooperative sold milk and cream to various milk distributors (the handlers)[2] who

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[2] The following handlers received price adjustments and were named as defendants in this action:

Colvins Dairy Erie, Pennsylvania
Erie Dairyland, Inc., Erie, Pennsylvania
Golden Crown Dairy, Erie, Pennsylvania
Golden Glow Dairy, Erie, Pennsylvania
Klein's Dairy, Farrell, Pennsylvania
Lingerlight Dairy Co., New Castle, Pennsylvania
Rieck Dairy Co., Erie, Pennsylvania
Schneider's Dairy, Inc., Pennsylvania
Snee Dairy, Inc., Pittsburgh, Pennsylvania
William Colteryahn & Sons, Pittsburgh, Pennsylvania
Yaples Dairy, Inc., Erie, Pennsylvania
Schruer's Dairy, Edinboro, Pennsylvania

processed the milk and sold it either as fluid milk or in manufactured milk products. During those years a portion of the milk industry in the Erie and Pittsburgh markets was subject to regulation by the Commission. The Commission specified minimum producer prices which handlers were required to pay for milk received at Pennsylvania plants from Pennsylvania producers. For purposes of state regulation the Cooperative is deemed a producer. Each of the handler defendants in all or part of the years 1957 through 1965 had a plant in Pennsylvania and bought milk for that plant from the Cooperative. At the same time, each handler defendant was at all times free under Pennsylvania law to purchase milk for its Pennsylvania plants from producers in adjoining states. The jurisdiction of the Commission did not extend to such interstate sales of milk. The only practical limitation on the ability of a Pennsylvania milk handler to purchase milk from producers in other states was the cost of refrigerated transportation.

Under the Commission's regulations the price paid by handlers to producers depended upon a system of classification reflecting the use to which the milk was put by the handlers, although all milk met the same standards of quality and purity. In western Pennsylvania in the years in question the Commission had established four use classifications:

Class I Bottled Drinking Milk, Skim Milk, Buttermilk

Class II Fluid Cream, Ice Cream Mix, Cottage Cheese, Sour Cream

Class III Butter, Cheese, Skim Milk Powder

Class IV Evaporated Milk

Class I is called "fluid" milk. All other classes are called "non fluid" or "manufactured" milk. At all relevant times the Commission's fixed price for Class I or "fluid" milk was much higher than that for all other classes. Thus it was

in the best interest of a producer to dispose of his milk to a handler whose resale business produced a high Class I utilization.

When the producer sent his milk to the Cooperative he did not know for what purpose it would be used. Moreover the proceeds of sale which he would ultimately receive were determined only after three steps:

(1) Calculation of the handler's blend price. At the end of each month the handler reported to the Commission and to the Cooperative its utilization in each class. The handler paid a price per hundred-weight calculated by applying to the class prices fixed by the Commission a percentage of utilization in that class. The result was a blend price per hundred-weight, which would vary downward from the Class I price depending on the percentage of "non fluid" uses to which the milk had been put. The blend price was further adjusted to reflect the butterfat content of the milk received from various sources.

(2) Calculation of the Cooperative's pool price. The Cooperative collected the monthly blend price from each handler. These receipts were all pooled. From the pooled receipts the Cooperative deducted the operating expenses and reserves referred to hereinabove. The total number of pounds of milk received each month was then divided into the net pool proceeds to derive the pool price per hundred-weight for each hundred-weight sold, calculated on the basis of a standard butterfat content.

(3) Calculation of each producer's share of the proceeds. The Cooperative would adjust each producer's share of the proceeds depending on the cost of collecting his milk on the farm and the butterfat content of the milk he shipped.

During the years in question milk production rose substantially throughout the Northeast. At the same time the prices fixed by the Commission for intrastate sale of Pennsylvania milk were substantially higher than the price of similar milk produced in Ohio, New York, and other states. Thus even when the cost of refrigerated transportation was taken into account each handler with a plant in western Pennsylvania could supply the fluid milk requirements of that plant with out of state milk at prices substantially lower than the Class I price fixed by the Commission. This left the Cooperative with these choices:

1. It could sell its members' milk to handlers outside of Pennsylvania free of price control by the Commission, at the available market price which was lower than the Pennsylvania Class I price.

2. It could sell its members' milk to Pennsylvania handlers for non-fluid uses at a price level where the Pennsylvania non-fluid price and the interstate price equalized.

3. It could seek to hold as customers those handlers whose resale business resulted in a high utilization of fluid milk by offering to meet the interstate price.

The third alternative was illegal under Pennsylvania Law.[3] It was, however, the course in fact pursued in a number of instances.

THE ANTITRUST CLAIM.

Plaintiff's antitrust claim, as explicated in our earlier decision, was that the defendants conspired to fix the price of milk shipped into Pennsylvania, to boycott out of state producers, and to suppress and eliminate competitors by a concerted refusal to deal with out of state producers,

[3] The defendants offered to prove that the Commission knew of the price adjustments and approved of them. This evidence was excluded.

all to the damage of the Pennsylvania producers. While it was not then clear how the Pennsylvania producers would have been injured in their business or property by such activity, the complaint so alleged, and we held that the plaintiff should be given an opportunity to offer evidence. At the end of the plaintiff's case the factual picture had become much clearer.

First, there is no evidence of any horizontal activity among any of the defendant handlers looking toward boycotting or toward price fixing on any level. *Compare, e.g., United States* v. *General Motors Corp.*, 384 U. S. 127 (1966). The Cooperative dealt separately with each handler, and there is no evidence that any handler was *aware* of the arrangement for rebating worked out with any other. Next, there is no evidence that the Cooperative attempted to impose upon any handler or that any handler agreed to any vertical arrangement respecting resale milk prices. *Compare, e.g. Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 689 (8th Cir. 1966); *United States* v. *Milk Drivers Local 471*, 153 F. Supp. 803 (D. Minn. 1957). The handlers' resale prices were actually fixed by the Commission. The evidence is that the Cooperative negotiated separately with each handler about the net price it would receive for the milk of its producers. Various methods or subterfuges for avoiding the Commission's wholesale fixed prices were resorted to. In each instance the pricing arrangement was agreed to between the Cooperative and the handler prior to the sale. In all cases the handler filed his utilization report with the Commission and paid the Cooperative the official blend price calculated on the basis of that report. In the case of some handlers the Cooperative had a prior agreement that the official blend price would be adjusted to reflect an agreed rather than actual utilization. Thus a handler who actually used 80% of the Cooperative's milk for Class I purposes might receive an adjustment on his blend price to reflect an agreed 60% Class I use. In other cases handlers re-

ceived agreed adjustments at a fixed rate per hundredweight, agreed adjustments to the price in the Youngstown federal milk marketing order, agreed adjustments of fixed amount per quart of milk sold at retail, a flat dollar amount per month, or an agreed adjustment for handling milk of low butterfat content. In each case the method of calculating the adjustment was negotiated separately between the Cooperative and a single handler prior to the sale. In each case the adjustment was made in the form of a rebate from the official blend price. The plaintiff's own evidence suggests that the economic effect of the price adjustments was that the Cooperative received more for its members' milk than it would have received had it insisted on the official blend price fixed by the Commission and that it thereby lost as customers those handlers with high Class I utilization.

This evidence, the district court held, was insufficient to go to the jury on the antitrust claim. We agree. The plaintiff's case establishes that the Cooperative, a sales agent with authority to sell milk to such parties and by such methods as its Board of Directors deemed to the best advantage of its members, negotiated individual contracts of sale with individual handlers at the best prices it could obtain from time to time in the face of competition from out of state producers. The handlers did not act in concert for any purpose. The Cooperative and individual handlers acted in concert only with respect to the price of individual sales contracts. There is no evidence even of conscious parallel action on the part of the handlers to exact larger rebates, to stabilize prices at any level or to boycott out of state producers. Indeed the evidence is that some handlers negotiated for better prices than others. Undoubtedly the officers and directors of the Cooperative acted with the common purpose of obtaining the best price they could obtain for their members' milk. Each handler, on the other hand, exacted the best price concession it could obtain for itself. Such individual sales contracts, negotiated

at arm's length without knowledge on the part of the purchasers of the prices being charged others similarly situated, cannot be regarded as contracts or combinations in restraint of trade. While the individual contracts may have been illegal under Pennsylvania law, they were not illegal under the antitrust laws.

Plaintiff argues that conscious parallel action among all of the defendants was sufficiently inferable from the evidence that the existence of a conspiracy was a jury question. No specific evidence is referred to, and our own review of the record discloses no evidence tending to show that any handler was ever aware of the price arrangement of any other. Evidence from which a conspiracy may be inferred is simply absent.

Having advanced a contention not supported by any evidence plaintiff goes on to concede:

> "However, the Plaintiffs are willing to rest their plea for summary judgment [4] on the undisputed and admitted facts that each of the Dairy Defendants [handlers] entered into a separate agreement with the Defendant Erie-Crawford [the Cooperative] to accept rebates on the price of milk sold and delivered to them which restrained commerce between the States in violation of Section One of the Sherman Act, thereby making each Dairy Defendant liable for the amount of money received by it as a rebate and making Defendant Erie-Crawford liable in damages for all of the several transactions with all of the Dairy Defendants."
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> (Appellant's brief in 71-1541 at 30).

Plaintiff's ultimate contention, then, is that an individual price rebate arrangement is, without more, a *per se* viola-

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[4] The plaintiff made a motion for a new trial and for summary judgment on the antitrust claim at the end of the case.

tion of Section One of the Sherman Act. We know of no case which has ever so held, and the same contention has been rejected. *Checker Motors Corporation* v. *Chrysler Corporation,* 405 F.2d 319 (2d Cir. 1969) *cert. denied,* 394 U.S. 999 (1969). The district court properly granted a directed verdict on the antitrust claim.

THE CONVERSION CLAIM.

The pendent claim for conversion under Pennsylvania law rests upon the same facts recited above. Plaintiff's theory of the case is that the payment of the rebates by the Cooperative was a conversion of money belonging to the members and that the Cooperative and the recipients are jointly liable for these amounts. The district court accepted plaintiff's theory, and charged the jury:

> "The property which the plaintiff contends was converted in this case was money which came into the hands of the cooperative association. The plaintiff contends that when the co-op gave money back to the dairymen or handlers, this deprived the plaintiff of the possession of that money. They contend, further, that they did not consent to this transfer of the money to the dairies, and that the co-op had no lawful justification for the action in giving back the money to the dairies.
>
> Plaintiffs contend, also, that the dairies had no right to receive this money, knowing that it was the lawful property of the plaintiffs.
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> The defendants, on the other hand, contend that because of the marketing agreement which each of the plaintiffs had signed, that they authorized the defendant to sell the milk at the best price possible, or as the contract phrases it, 'to the best advantage of the farmers.' They claim that it would not have been possible to sell the milk had not an agreement been made to refund part of the price to the dairies, and

that by giving the milk to the co-op on a consignment, the farmers authorized such transaction.

* * *

The contract between the farmers and the co-op must be read in light of the existing law, that is, it is implied in every contract, even if it is not written there, that it must be performed in accordance with the law. Therefore, when a contract provides that the milk must be sold and disposed of to the best advantage of the producer, it is understood to mean 'in accordance with the law.'

Therefore, I instruct you that when the farmers or producers turned over the milk to the co-op, it was with the condition, and as part of the contract, that the milk be sold at the legal price." (919-921b)

The court then read 31 Pa. Stat. Ann. § 700j-807 and charged:

"Therefore, the term of an agreement between the co-op and a dealer which required the co-op to refund part of the officially set price for the milk was illegal and could not be enforced by the dealer. There was, therefore, no legal way in which the co-op could have been forced to pay back to the dealer any amount which it had agreed upon in advance as a refund or as a discount." (923b)

The only defense which the court permitted the jury to consider was the defense that some members of the class might knowingly have consented to the rebates. Summarizing at a later point the court charged:

"Now, to sum up once again the elements of a conversion—it is the deprivation of the right of property in, and in this case, money, or other interference with the money without the owner's consent, and without lawful justification. If a conversion occurs, and the

plaintiffs prove the damages, the damges recoverable is the actual loss to the plaintiffs." (923b).

The foregoing amounted to a directed verdict that the illegal rebates were conversions, and it is not surprising how the jury answered interrogatory No. 1:

"Q. Were the plaintiffs deprived of money which they had a right of possession by the payment of rebates?

A. Yes." (430a)

The jury also answered these interrogatories on damages:

"5 [Q] Did the conversion of plaintiff's property by the defendants result in only nominal ($1.00) damages to the plaintiffs?

[A] No.

6 [Q] Are the defendants entitled to a reduction in the damages claimed by the plaintiffs?

[A] No." (431a)

These interrogatories and answers must be read in light of the court's charge on damages. Having in effect charged that a conversion had taken place, it then charged:

"If a plaintiff proves a conversion without anything more, he is entitled to nominal damages; that is, one dollar. If he is to recover more than nominal damages, he must prove the actual amount of his loss.

The plaintiffs in this case claim that the amount of rebates is the actual amount of their loss, since they maintain that nothing further was to be taken from this amount of money, all authorized deductions having previously been taken out." (926-927b)

The court then referred to the fact that the amount of the refunds had been stipulated, and continued:

"Even though the defendants may be guilty of a technical conversion, they are entitled to show in reduc-

tion of damages any facts or circumstances which they claim would tend to reduce the amount required justly to compensate the plaintiffs for the actual loss they sustained as the proximate result of the defendants' acts.

Just as the burden of proof of actual loss is upon the plaintiff, the burden of proof of reduction of damages is upon the defendants." (927b)

Thus the court charged, in effect, that the stipulated rebates proved the actual loss, and that the burden was on the defendants to show any reduction in damages. Reference was then made to the evidence tending to show that if the rebate arrangements had not been made the price obtained in the market place would have been lower. But the court effectively ruled out consideration of any of the evidence by charging that ". . . if there was a concealment by the defendants which prevented the plaintiffs from taking steps to secure better prices for their milk, then a reduction in damages to that extent would not be proper" (929b). Thus the only question left to the jury was whether the producers knew of the rebate practices of the Cooperative. If the illegal rebates were concealed the defendants were liable for the full amount.

This charge, defendants claim, was error in two related respects. They claim, first, that the evidence did not establish that the plaintiffs had a property right in the Cooperative's money, and hence that no conversion of that money took place. Secondly they claim that by accepting in full the theory of conversion of the money, the court relieved the plaintiff of the burden of establishing an essential element of tort claim—actual damage and loss.

The relationship between the Cooperative and the producers is not in dispute. It is defined in a written agreement (Exhibit 109). Under that agreement the Cooperative is a consignee agent with a power of sale. It is authorized to blend the milk of all the members and to sell all that

milk. It is authorized to pool the proceeds of sale, to deduct reserves for dividends and for capital purposes, and to pay all operating expenses including transportation, selling and processing costs. It is authorized to calculate what part of the net remaining proceeds is payable to each member, taking into account the varying transportation costs in collecting his milk and its varying butterfat content. The Cooperative is a separate legal entity with a board of directors, officers and stockholders. While the producers may have retained title to the consigned milk until sale, it is quite clear that the members do not have title to the proceeds of sale. Each has only a contract right to be paid by the Cooperative a sum of money calculated in accordance with his agreement. At best each has a right to an accounting from his debtor-agent. The agreement set forth in Exhibit 109 must be contrasted with Supervised Agency Accounts such as we construed in *Dubern* v. *Girard Trust Bank*, No. 19,515 (3d Cir., filed January 26, 1972).

Under Pennsylvania law conversion is the "deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification" *Cenna* v. *United States*, 402 F.2d 168, 170 (3d Cir. 1968); *Stevenson* v. *Economy Bank of Ambridge*, 413 Pa. 442, 451, 197 A. 2d 721, 726 (1964); *Gottesfeld* v. *Mechanics & Traders Ins. Co.*, 196 Pa. Super. 109, 115, 173 A. 2d 763, 766 (1961). A taking of a person's property with consent to use the property for one purpose, but with the intent to use it for another purpose may be a conversion. *Cenna* v. *United States*, 402 F.2d at 170; *Gottesfeld* v. *Mechanics & Traders Ins. Co.*, 196 Pa. Super. at 115, 173 A. 2d at 766. In this case it may be that the Cooperative's authority as a consignee for sale was limited to sale at the prices fixed by the Commission. But if any conversion of the plaintiff's property took place it was conversion of milk, not of money.

Assuming, as did the district court, that the Cooperative's authority to sell the milk was limited to sale at prices

set by the Commission, there is evidence of a conversion of milk. But there is no evidence in the plaintiff's case that this conversion caused any damage. The measure of damages for conversion is the market value of the property converted. Restatement (Second) of Torts § 222A (1965), Restatement of Torts § 927 (1939). See *Guido* v. *Hudson Transit Lines, Inc.*, 178 F.2d 740, 742 (3d Cir. 1950); *Bumbarger* v. *Walker*, 193 Pa. Super. 301, 164 A. 2d 144, 150 (1960); *Holt* v. *Pariser*, 161 Pa. Super. 315, 54 A. 2d 89 (1947); *cf. Dubern* v. *Girard Trust Bank*, No. 19,515 (3d Cir., filed January 26, 1972). The limited evidence in plaintiff's case tends to show that the rebating arrangements, though producing net prices lower than those fixed by the Commission for a given use class, produced more revenue than would have been produced by attempts to sell in the open market. But by permitting the plaintiff to proceed on a theory that money, not milk, was converted the district court relieved him of the burden of establishing that the Cooperative received less than the actual market value of the milk which is sold.

Moreover, the defendants urge, the effects of the district court's acceptance of the conversion of money theory was to grant partial rescission, or more precisely reformation, of fully executed, though illegal, contracts of sale. The Restatement of Contracts § 605 (1932) states:

> "Where money has been paid or goods have been delivered under a bargain containing illegal provisions the money or the value of the goods can be recovered so long as the illegal part of the bargain is wholly unexecuted, unless entering into the bargain involves serious moral turpitude on the part of the plaintiff."

Comment *a* to § 605 states:

> "Where any illegal performance as all or part of the consideration is an indivisible contract has been actually rendered, it is clear that nothing, under the rule stated in the Section, can be recovered."

See also Restatement of Restitution § 140 comment *a* (1937). Although no Pennsylvania case has been called to our attention which refers to these Restatement provisions, it seems clear from earlier Pennsylvania cases that Pennsylvania would treat a fully executed illegal contract as a matter in repose. *See, e.g., McKee* v. *Verner*, 239 Pa. 69, 74, 86 A. 646 (1913); *Blystone* v. *Blystone*, 51 Pa. 373, 374 (1865); *Askeny* v. *Lohr*, 99 Pa. Super. 203, 206 (1930). Even a contract voidable for fraud or misrepresentation cannot be avoided in part. Restatement of Contracts § 487. Yet the court's charge in effect voided the contract in part by requiring the defendants to pay more for the goods purchased than they had agreed to pay. It did so, of course, on behalf of principals who claim their agent lacked authority to make an illegal contract. But parties contracting through an agent have no greater rights with respect to rescission or reformation of executed illegal contracts than do parties who have acted directly. Looked at from the standpoint of the law of agency the district court's wholehearted acceptance of the plaintiff's theory of the case was also improper. The Cooperative was a sales agent. The governing rule is set out in Restatement (Second) of Agency § 424 (1958):

> "Unless otherwise agreed, an agent employed to . . . sell is subject to a duty to the principal, within the limits set by the principal's directions, . . . to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal."

Comment *g* to § 424 provides:

> "The violation of duty by the agent may be selling to a third person at too low a price something which he is otherwise authorized to sell. In this case, the principal is entitled to recover the thing in specie or its value from the purchaser, if the agent had no power to bind the principal. Whether or not the transaction was binding upon the principal as to the purchaser,

> the principal is entitled to recover from the agent the difference between the amount received and the value of the property sold at the time of sale, or its highest value within a reasonable time after the principal acquires notices of the sale, whichever is larger; or the amount which the agent would have received if he had obeyed the principal, with interest from the time of sale. . ."

See also Restatement (Second) of Agency § 424, Comment *h;* Restatement (Second) of Torts § 222A(1), Comment *c,* § 225, Comment *d.* The key element in measuring damages for a conversion, by a sales agent or otherwise, is the value of the product converted. The district court's charge effectively removed this element from the jury's consideration first by charging that money rather than milk had been converted, next, by placing on the defendants the burden of proof on damages, and finally, by introducing into the determination of value of the thing converted the element of concealment, which on the value of the thing converted was irrelevant.

Clearly the jury verdict based upon the court's acceptance of the plaintiff's simplistic but erroneous theory of the case cannot be allowed to stand. The defendants assert that they should have been awarded judgment notwithstanding the verdict because the plaintiff failed completely to prove any damage. *See, e. g., Bruce Lincoln-Mercury Inc.* v. *Universal C. I. T. Credit Corp.,* 325 F. 2d 2, 14 (3d Cir. 1963); *Openbrier* v. *General Mills, Inc.,* 340 Pa. 167, 16 A. 2d 379 (1940); *Mike* v. *Lian,* 322 Pa. 353, 185 A. 775 (1936). In that posture, defendants urge, we should simply reverse. If this were not a class action we would do so. By adopting and pursuing an erroneous view of the law of conversion, the plaintiff, a class representative, neglected to make any attempt to prove that the prices obtained by the Cooperative from the several handlers was less than the price available in the market place. From

the evidence presented in the defendants' case and from some concessions made by plaintiff's witnesses it seems unlikely that any such proof is available. But in view of the fact that some 290 class members were relying on the plaintiff's representation we reluctantly conclude that a new trial may be more appropriate than a reversal.

Fed. R. Civ. P. 50(d) provides that if the appellate court reverses a judgment denying a motion for judgment notwithstanding the verdict, nothing in the rule precludes it from determining that the appellee is entitled to a new trial. In *Neely* v. *Martin K. Eby Construction Co.*, 386 U. S. 317 (1967) and *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967) the Supreme Court has indicated that the courts of appeal have discretion to enter judgment in favor of the party who moved for judgment notwithstanding the verdict, to order a new trial, or to remand to the trial court to afford the plaintiff an opportunity to present a motion for a new trial. The latter course is most appropriate here. The plaintiff as appellee in the defendants' appeal did not as Rule 50(d) provides, brief any grounds entitling him and the class he represents to a new trial in the event we concluded, as we have, that the trial court erred in denying the motion for judgment notwithstanding the verdict. It is not at all clear that on the pleadings before the district court the case could have been submitted to the jury on the theory that milk rather than money had been converted. If that theory is a complete departure from the case pleaded through the pretrial conference a new statute of limitations problem may be presented. Moreover the plaintiff may not be in a position to make an offer of proof on the issue of damage or loss from the illegal milk sales. These matters should, we think, be explored by the district court on a motion for a new trial.

Since we are remanding for consideration by the district court of a motion for a new trial it is appropriate to deal with a number of other issues raised by the several appeals.

THE DIRECTORS DEFENDANTS

The plaintiff appeals from the order granting judgment notwithstanding the verdict to the individual director defendants, Hanas, Raybuck, Culbertson, Triscuit, Boyd, Henry, Black, Mitchell, and Spaid. This ruling left standing only the verdict against director-officer Yost, who participated directly in the rebate negotiations. The other director defendants, the evidence disclosed, knew about and approved of the rebate policy. They believed, in fact, that nothing else could be done to preserve the Cooperative's markets. After reviewing the Pennsylvania cases on directors' liability the district court concluded that Pennsylvania would not impose personal tort liability on the knowledgeable, approving, but not directly participating directors. The issue is a difficult one. There are no Pennsylvania cases directly in point. Perhaps the closest is *Cohen* v. *Maus,* 297 Pa. 454, 147 A. 103 (1929), which exonerated directors from liability in conversion because:

> "There was no testimony showing that any of the defendants, have Maus, knew of the sale [constituting the conversion], and that none of them had any knowledge of the sale of it . . . and it was not shown that they had wilfully, and knowingly, participated in the trespass . . . Here persons who were directors in a corporation are sought to be held individually liable for a conversion of property about which they knew nothing merely because, if they had examined the books of the corporation, they might have ascertained that the conversion had taken place. We cannot lend our assent to the establishment of such a doctrine." *Id.* at 456-57; 147 A. at 103-04.

See also Chester-Cambridge Bank & Trust Co. v. *Rhodes,* 346 Pa. 427, 431, 31 A. 2d 128, 130 (1943); *Swentzel* v. *Penn Bank,* 147 Pa. 140, 153, 23 A. 405, 415 (1892); *compare Armour and Company* v. *Celic,* 294 F. 2d 432 (2d

Cir. 1961); *See* 3 W. Fetcher, Corporations § 1137 at 782-83 (perm ed. 1965 rev.), which suggets the rule that an officer of a corporation will not be held personally liable for a tort ". . . unless he specifically directed the particular act to be done, or participated, or co-operated therein."

Our best judgment is that the Courts of Pennsylvania would hold that directors of a sales agent corporation with authority from its prinipals to sell only at legal prices who knowingly authorize sales at less than those prices have participated in conversions and are personally liable. Thus we will reverse the order granting judgment notwithstanding the verdict to the director defendants. We recognize that if the case is retried on the theory that milk rather than money was converted the evidence may disclose reasons why they should not be held liable. For example, the evidence may disclose that they authorized illegal sales only at or above the available market price, but that unknown to some of them some sales took place below that price, and hence caused damage.

THE STATUTE OF LIMITATIONS

The district court submitted to the jury an interrogatory for each defendant asking if the Pennsylvania six year statute of limitations is a defense to events which occurred before May 31, 1960. In each case the jury answered no. The district court granted judgment notwithstanding the verdict as to all events prior to that date. The parties agree that May 31, 1960 is the date beyond which recovery would be barred by 12 Pa. Stat. Ann. § 31, unless the plaintiff could establish fraudulent concealment. The evidence on the fraudulent concealment issue was not affected by the wrong theory of conversion on which the plaintiff tried the case, and since we have concluded that the grant of judgment notwithstanding the verdict with respect to events prior to May 31, 1960 was correct, we will affirm that order.

The statute of limitations may be tolled if the plaintiff by clear, precise and convincing evidence shows fraudulent concealment by the defendants. *See, e.g., Walters* v. *Ditzler*, 424 Pa. 445, 449-50, 227 A. 2d 833, 835 (1967); *Nesbitt* v. *Erie Coach Co.*, 416 Pa. 89, 204 A. 2d 473, 476-77 (1964). In *Overfield* v. *Pennroad Corp.*, 146 F. 2d 889 (3d Cir. 1944) this court wrote:

> "We are confronted at the outset . . . with the proposition, laid down over and over again in the Pennsylvania decisions that the concealment which tolls the statute must be in an affirmative, independent act of concealment; mere silence or non-disclosure, even by corporate officials is not enough." 146 F. 2d at 896 (footnote omitted).

The district court correctly applied the governing standard to the evidence. There was no evidence of affirmative effort made by any defendant to conceal the pric adjustments from the producers.

THE DAMAGES RECOVERABLE

Although all but 290 of the class members, after notice pursuant to Fed. R. Civ. P. 23, opted out, plaintiff asserts that he should be entitled to recover all of the damages sustained by the class, even by those who had requested to be excluded. The district court held that only the damages sustained by members of the class as presently constituted would be assessed. We agree. *See* Fed. R. Civ. P. 23(c)(3).

APPLICATION OF 46 PA. STAT. ANN. § 156

The defendants contend that the Act of March 21, 1806, Pub. L. No. 558, 4 Sm L 326, § 13, 46 Pa. Stat. Ann. § 156 bars the suit for conversion because that statute requires that in all cases where a statutory remedy is provided the statutory remedy must be pursued before resort to the com-

mon law.[5] The district court rejected this contention. No decision of a Pennsylvania court has held that the Commission is the exclusive forum. The Milk Control Law, 31 Pa. Stat. Ann. § 700j-1003 provides in part:

> "[A]ny person . . . may institute such action at law or in equity . . . to enforce compliance with any provision of this act, or to enforce compliance with any rule, regulation or order of the board. . . ."

Possibly the Act of 1806 imposes an exhaustion of remedies requirement if a producer does resort to the Commission pursuant to the alternative remedy in 31 Pa. Stat. Ann. § 700j-1005. *See Colteryahn Sanitary Dairy* v. *Milk Control Commission,* 332 Pa. 15, 23, 1 A. 2d 775, 780 (1938). But it seems clear from § 1003 that the Pennsylvania legislature did not, in enacting the Milk Control Law, intend any preemption. The district court concluded correctly that the existence of an alternative remedy before the Commission did not deprive the court of pendent jurisdiction over the conversion claim.

EVIDENCE RULINGS

The district court refused to admit evidence that the price adjustments they received were deemed to be lawful by the Commission. These offers were rejected because the court ruled as a matter of law that regardless of the Commission's position the rebates were unlawful. The proffered evidence was deemed irrelevant on the issue of conversion since, assuming illegality, good faith was not a defense.

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[5] "Acts of assembly to be strictly pursued

> In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

We agree that the legality or illegality of the rebates under the Pennsylvania Milk Control Act was a matter of law to be decided by the court. We think, however, that in ruling on some of the proffered evidence of the Commission's attitude about some of the rebate schemes the district court took too narrow a view of the Commission's role. It is true, as the court charged, that 31 Pa. Stat. Ann. § 700j-807 prohibits methods or devices whereby milk is bought at a price less than the minimum established for the transaction, whether by discount, rebate, or otherwise. But it is also true that the Commission has a broad discretion under 31 Pa. Stat. Ann. § 800j-801 to modify its milk price orders, and that 31 Pa. Stat. Ann. § 700j-806 provides:

> "The board may likewise fix by official order, the terms upon which milk dealers shall pay producers and others for milk, may prescribe the method of computing payment therefor, and may prescribe a form of written statement to be sent to producers with each payment."

It would seem that much of the proffered evidence tended to establish the Commission's interpretations of its own milk price orders and its approval, as methods of computing payment, of various price adjustment schemes. The Pennsylvania Commission's interpretations of its own regulations ought to be binding on a federal court, at least in instances where there is no Pennsylvania court decision to the contrary. The case of *Milk Control Commission* v. *McAllister Dairy Farms,* 384 Pa. 459, 121 A. 2d 144 (1956) on which the district court relied is not such a case. In that case the Commission sought judicial enforcement of its own interpretation of its order. In the same category are *Milk Control Commission* v. *Rieck Dairy Division,* 193 Pa. Super. 32, 163 A. 2d 891 (1960) and *Shearer's Dairies Inc.* v. *Milk Control Commission,* 191 Pa. Super. 574, 159 A. 2d 268 (1960).

Since the proffered evidence was not admitted we do not know if it would have shown some of the rebate arrangements to have been approved by the Commission. We hold that if the Commission did so approve it would have been acting within the scope of its authority under 31 Pa. Stat. Ann. §§ 700j, 801-806.

The order of the district court of April 15, 1971 contains six ordering paragraphs, all of which are before us in one or another of the consolidated appeals. Paragraph 1, denying plaintiff's motions for a new trial and for summary judgment on the antitrust count will be affirmed. Paragraph 2, granting judgment notwithstanding the verdict to the defendants Hanas, Raybuck, Culbertson, Triscuit, Boyd, Henry, Black, Mitchell, and Spaid, will be reversed. Paragraph 3, granting defendants' motions to vacate the jury's verdict in answer to Interrogatory No. 8 on tolling the statute of limitations will be affirmed. Paragraph 4 denying the motions of the defendants Erie-Crawford Cooperative Association and Host for judgment notwithstanding the verdict will be affirmed. Paragraph 5, limiting assessment of damages to the extent of the proportionate share to which members of the class who elected to join in the lawsuit, will be affirmed. Paragraph 6, denying defendants' motions for a new trial on the conversion count will be reversed and the cause remanded for consideration by the district court of a motion by the plaintiff to be served within ten days of the date the mandate of this court is filed in the district court. Each party will bear its own costs.

To the Clerk of the Court:

Please file the foregoing opinion.

JOHN J. GIBBONS

ROBERT M. KNUTH, on behalf of himself and on behalf of all other members of the class who are similarly situated,

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, WILLIAM COLTERYAHN & SONS, INC., KLEIN DAIRY, LINGERLIGHT DAIRY COMPANY, SCHNEIDER'S DAIRY, INC., SNEE DAIRY COMPANY, ERIE DAIRY LAND, INC., GOLDEN CROWN DAIRY, SCHRUER'S DAIRY, YALPLE'S DAIRY, INC., GOLDEN GLOW DAIRY, SEALTEST FOODS, DIVISION OF NATIONAL DAIRY PRODUCTS CORPORATION, HOWARD YOST, JOHN HANAS, RUSSELL RAYBUCK, MILTON CULBERTSON, DONALD TRISCUIT, RAYMOND BOYD, CALVIN HENRY, ROY BLACK, LOREN MITCHELL, CHARLES SPAID.

Nos. 71-1541 thru 71-1548.

ROSENN, *Circuit Judge,* Concurring and Dissenting

I fully agree with the majority that the district court properly granted a directed verdict on the antitrust claim.

I would remand this case, however, for a new trial solely on the issue of whether the directors of Erie Crawford exceeded their power as agents for the producers and by so doing caused actual loss to the plaintiff class.

I do not find that there has been any conversion, of milk or money, in this case. While I agree with the majority that a conversion is the deprivation of another's right in property, or the unlawful interference with that property, I do not find any such improper activity amounting to a conversion of the consigned milk on the facts before us. A claim based on converting a chattel, the milk in this case, would require the producers to show that they had consented to the cooperative's control over the milk for one purpose which was then ignored when the milk was sold. *See* Restatement of Torts 2d § 228. However, a new trial could not show that the cooperative exercised any unlawful dominion over the milk that interfered with any of the

producers' rights. There seems no way plaintiff will be able to change the seemingly conceded and inescapable conclusion that the cooperative sold the milk at the prices set by the Pennsylvania Milk Control Commission, precisely as the producers wanted. Furthermore, as Comment (g) to Section 228 makes clear, there is no conversion "unless [the control exercised] amounts to such a serious violation of the other's right of control as to justify requiring the user to pay the full value of the chattel." The plaintiff's own statement of damages illustrates he cannot meet that burden: he seeks only the difference between the Milk Control Commission price and the amount actually received.

However, I would agree with the majority that there was no conversion of funds because the producers did not have a right to immediate title to the proceeds. They possessed only a contractual right to a sum that reflected payments to the cooperaive for its services. In addition, in Pennsylvania, it has been determined that when an agent exercises unlawful dominion over funds otherwise owing to his principal he has not committed a conversion, and is at best liable to pay over the sum he received plus any damages brought about by his negligent conduct. *Allegheny By-Product Coke Co.* v. *J. H. Hillman & Sons Co.*, 275 Pa. 191, 118 A. 900, 905 (1922).

In light of Pennsylvania law and the facts of this case, I would conclude that the only possible improper action was that the cooperative exceeded its authority under its contracts with the producers. Section 424 of the Restatement of Agency 2d requires an agent to act within the limits set by the principal's directions, and Section 402 declares that the agent shall be liable for any loss incurred because he deviates substantially from his authority to transfer goods to a third person in a sale. Therefore, if an improper sale at too low a price takes place, the principal can recover his actual loss. *See,* Comment (g), § 424, Restatement of Agency 2d.

This action cannot include within its ambit any of the producers. They were not required to follow the duties imposed upon Erie Crawford under the contracts between the cooperative and the plaintiff class. In addition, they are protected because the agreements they signed with the cooperative were within its implied powers and therefore bound their principals, the producers.

Further, I would conclude that because Erie-Crawford is a cooperative made up of members of the plaintiff class, it cannot be a defendant in this action. A recovery from it would merely take money out of one pocket of a producer and put it back in another pocket. While recovery would be limited to those who are actual members of the class, the class representative asserts that all of the members of the cooperative have been equally wronged. There is then certainly no justification for the non-class members to pay money to class members when they both are assertedly equally innocent and injured.

As a result, that leaves the class only an action against those directors who agreed to a policy which may have exceeded their powers under the contracts between the cooperative and the producers. While I doubt that the plaintiff class will be able to prove any damages from these actions, I agree with the majority that they should have their day in court to present their case.

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1541/8

ROBERT M. KNUTH, on behalf of himself and on behalf of all other members of the class who are similarly situated,

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, WILLIAM COLTERYAHN & SONS, INC., KLEIN DAIRY, LINGERLIGHT DAIRY COMPANY, SCHNEIDER'S DAIRY, INC., SNEE DAIRY COMPANY, ERIE DAIRY LAND, INC., GOLDEN CROWN DAIRY, SCHRUER'S DAIRY, YAPLE'S DAIRY, INC., GOLDEN GLOW DAIRY, SEALTEST FOODS, DIVISION OF NATIONAL DAIRY PRODUCTS CORPORATION, HOWARD YOST, JOHN HANAS, RUSSELL RAYBUCK, MILTON CULBERTSON, DONALD TRISCUIT, RAYMOND BOYD, CALVIN HENRY, ROY BLACK, LOREN MITCHELL, CHARLES SPAID.

Robert M. Knuth and Robert W. Bryer and others similarly situated by their attorney, Paul A. Simons, Appellants in No. 71-1541,

Erie-Crawford Dairy Cooperative Association, Appellant in No. 71-1542,

Howard Yost, Appellant in No. 71-1543,

William Colteryahn & Sons, Inc., Appellant in No. 71-1544,

Lingerlight Dairy Company, Appellant in No. 71-1545,

Erie Dairy Land, Inc., Appellant in No. 71-1546,

Golden Glow Dairy, Appellant in No. 71-1547,

Yaple's Dairy, Inc., Appellant in No. 71-1548.

(D. C. Civil Action No. 65-1328.)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed April 15, 1971, as to Paragraph 1, denying plaintiff's motions for a new trial and for summary judgment on the antitrust count be, and the same is hereby affirmed. Paragraph 2, granting judgment notwithstanding the verdict to the defendants Hanas, Raybuck, Culbertson, Triscuit, Boyd, Henry, Black, Mitchell, and Spaid, be, and the same is hereby reversed. Paragraph 3, granting defendants' motion to vacate the jury's verdict in answer to Interrogatory No. 8 on tolling the statute of limitations be, and the same is hereby affirmed. Paragraph 4, denying the motions of the defendants Erie-Crawford Cooperative Association and Host for judgment notwithstanding the verdict be, and the same is hereby affirmed. Paragraph 5, limiting assessment of damages to the extent of the proportionate share to which members of the class who elected to join in the lawsuit be, and the same is hereby affirmed. Paragraph 6, denying defendants' motions for a new trial on the conversion count be, and the same is hereby reversed and the cause remanded for consideration by the district court of a motion by the plaintiff to be served within ten days of the date the mandate of this court is filed in the district court. Each party will bear its own costs.

Attest:

THOMAS P. QUINN,
Clerk.

June 28, 1972.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1541 thru 71-1548

ROBERT M. KNUTH, on behalf of himself and on behalf of all other members of the class who are similarly situated

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, ET AL.
ROBERT M. KNUTH, ET AL., *Appellants*

Sur Petition for Rehearing

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN AND HUNTER, Circuit Judges

The petition for rehearing filed by Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

JOHN J. GIBBONS
Judge

Dated: July 28, 1972.

APPENDIX C

ROBERT M. KNUTH, on behalf of himself and all others similarly situated

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION ET AL., ROBERT M. KNUTH, *Appellant.*

No. 16656.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Argued Dec. 8, 1967.

Decided May 3, 1968.

Rehearing Denied June 20, 1968.

Paul A. Simmons, Tempest & Simmons, Monongahela, Pa., for appellant.

Thomas W. Pomeroy, Jr., Kirkpatrick, Pomperoy, Lockhart & Johnson, Pittsburgh, Pa. (W. Walter Braham, Jr., Harry W. Turner, Pittsburgh, Pa., on the brief), for appellees, Erie-Crawford Dairy Cooperative, Dairymen's Cooperative Sales Assn., and others.

Frank L. Seamans, Robert C. McCartney, Edward G. O'Connor, Eckert, Seamans & Cherin, Pittsburgh, Pa., for appellees, Sealtest Foods Div. of Nat. Dairy Products Corp. and Akron Milk Producers Cooperative.

Clyde W. Armstrong, Victor P. Gottschell, Thorp, Reed & Armstrong, Pittsburgh, Pa., for appellees, Golden Glow Dairy, Yaple's Dairy, Inc., Schruer's Dairy, Golden Crown Dairy and Erie Dairy Land, Inc.

Willis F. Daniels, Daniels & Swope, Harrisburg, Pa., for appellee, Sterling Milk, Inc.

William W. Knox, Knox, Pearson & McLaughlin, Erie, Pa., for appellee, H. Robert Fischer.

Nathan Routman, Routman, Moore & Goldstone, Sharon, Pa., for appellee, Klein Dairy.

Henry E. Rea, Jr., Brandt, Riester, Brandt & Malone, Pittsburgh, Pa., for appellee, Schneider's Dairy.

Errol Fullerton, New Castle, Pa., for appellee, Linger Light Dairy.

Before BIGGS, KALODNER, and SEITZ, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

This is an appeal from a judgment dismissing an amended complaint with prejudice for failure to state a claim.[1]

Plaintiff's class action claim (Count I) asserted under Section 4 of the Clayton Act,[2] alleged violations of Sections 1 and 2 of the Sherman Act.[3] The class represented

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[1] Plaintiff does not challenge the dismissal of the Clayton Act claim (Count II), consequently this decision does not affect the district court's disposition of that count. A state action claim (Count III) based on pendent jurisdiction was dismissed below. The correctness of that action is considered later herein.

[2] 15 U.S.C.A. § 15, reads as follows:

"Section 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may * * * recover threefold the damages by him sustained * * *."

[3] 15 U.S.C.A. § 1 reads in pertinent part:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal * * *."

15 U.S.C.A. § 2 reads in pertinent part:

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

by appellant allegedly consisted of approximately 1,200 Pennsylvania farmer-producers ("producers") who furnished milk for the period designated to one of the defendants Erie-Crawford,[4] a Pennsylvania cooperative marketing organization. Erie-Crawford in turn sold the milk to certain of the other defendants ("processors") who processed it and sold it to retailers as bottled milk or dairy products.

The appellant and the other Pennsylvania producers he purports to represent furnished raw milk to their marketing cooperative, Erie-Crawford, under a contract by which the net proceeds of all money received by Erie-Crawford was to be paid to them as their interests appeared. This milk was sold to the processors at prices per hundredweight fixed by the Pennsylvania Milk Control Commission under statutory authority.[5] Erie-Crawford also received milk from producers outside of Pennsylvania. This milk was shipped into Pennsylvania and sold to the processors at prices per hundredweight which were less than the fixed selling price of the Pennsylvania produced milk. All proceeds received by Erie-Crawford from the sale of milk were placed in a market-wide milk price pool. From this pool, all farmer-producers were paid an equal net amount per hundredweight of milk supplied regardless of the amounts received for any particular farmer-producer's milk.

The best analysis we can make of Count I of plaintiff's amended complaint reveals that three courses of conduct involving defendants are alleged to constitute violations

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[4] Also named as defendants were Erie-Crawfords's officers, directors and attorney and other cooperatives.

[5] 31 Purdon's Pa.Stat.Ann. § 700j-101 et seq. We note that the law creating the Commission was declared constitutional in Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939).

of Sections 1 and 2 of the Sherman Act. We first state them in summary fashion and then treat them seriatim.

Plaintiff alleges a conspiracy by all appellees:

I. to fix the price of milk shipped into Pennsylvania by granting rebates to the processors on the milk produced in Pennsylvania and purchased by them from Erie-Crawford;

II. to suppress and eliminate competition in the sale of milk and other dairy products as evidenced by the Erie-Crawford directors' action in causing Pennsylvania milk to be shipped into Ohio and other states and then reshipped to Pennsylvania so that it can be sold to the processors at a price below the minimum price fixed by the Pennsylvania Milk Control Commission;

III. to suppress and eliminate competition in the sale of milk and other dairy products by the processors' concerted refusal to deal directly with the producers, and also by their refusal to buy milk from any source other than those sources approved by Erie-Crawford.

The damages from the foregoing conduct are alleged to be an amount equal to the rebates plus other specific economic loss.

Since Count I was dismissed with prejudice for failure to state a claim, we must take the material allegations of the complaint to be true. Doubts should be resolved in favor of the position which will uphold the pleading as such. Decisions of the United States Supreme Court indicate that we should be extremely liberal in construing antitrust complaints. See Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); Radovich v. National Football League, 352 U.S. 445, 453-54, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); and United States v. Employing Plasterers' Ass'n, 347 U.S. 186, 188-189, 74 S.Ct. 452, 98 L.Ed. 618 (1954). Indeed, in the Em-

ploying Plasterers' case, the Supreme Court made it clear that, "whether [the] charges be called 'allegations of fact' or 'mere conclusions of the pleader,' * * * they must be taken into account in deciding" whether a claim for relief is stated. Above at p. 188, 74 S.Ct. at p. 454. And they further said that,

"* * * [W]here a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12(e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56." Above at p. 189, 74 S.Ct. at p. 454.

The "liberal" approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings. See Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference, 113 F.Supp. 737 (E.D.Pa.1953).[6] In the use of Section 4 of the Clayton Act, the courts have attributed to a private litigant the role of an ancillary force to supplement governmental enforcement of the antitrust laws. See United States v. Borden Co., 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954). All the law requires to state a private treble damage action claim are allegations adequate to show a violation of the antitrust acts and that plaintiff has been damaged thereby. Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., above.

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[6] The ruling in Black and Yates v. Mahogany Ass'n, 129 F.2d 217, 148 A.L.R. 841 (3d Cir. 1942), that an anti-trust complaint to be sufficient, must allege "some facts," has no decisive pertinency to this amended complaint.

We also take occasion to note that Section 1 of the Capper-Volstead Act[7] does not authorize combinations or conspiracies between cooperatives and others in restraint of trade. United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939). Indeed, such a cooperative may even be liable under the Sherman Act without proof of involvement of non-cooperatives if the activity under attack is predatory. Maryland and Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960).

We turn now, with the aforementioned principles in mind, to a seriatim analysis of the three courses of conduct which we infer from the amended complaint are the alleged violations of the Sherman Act.

I. Rebates

Plaintiff claims that the defendants conspired to fix the price of milk shipped into Pennsylvania by the use of rebates to the processors on milk produced in Pennsylvania and purchased by them from Erie-Crawford. The date of the conspiracy is alleged, plus an allegation concerning defendants' knowledge of the price set for milk by the Pennsylvania Milk Control Commission. Rebates given solely on Pennsylvania milk allegedly result in the suppression and elimination of competition by preventing the free flow of milk in interstate commerce from sources outside the State of Pennsylvania into the State of Pennsylvania. The object of this alleged combination and conspiracy was to accomplish the raising, fixing, controlling, setting, stabilizing and affecting the price of milk shipped in interstate commerce.

As we read the opinion of the district court it held that the rebate allegation involved solely a question of state law,

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[7] 7 U.S.C.A. § 291.

i. e., whether the rebate practice was contrary to the Pennsylvania Milk Control Act. But it does not matter whether the practice was legal or illegal under state law if it was prohibited action under the Sherman Act. Certainly, it is not suggested that the rebate practice is required by state law. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The issue then is whether the allegations sufficiently show a violation of the Sherman Act to withstand a motion to dismiss.

Plaintiff's allegation of a conspiracy to fix prices in the interstate transportation of milk by the use of rebates states the elements necessary to show a violation of Section 1 of the Sherman Act. The payment of rebates to processors who purchase Pennsylvania produced milk, without other evidence, would tend to encourage such processors to purchase more Pennsylvania milk in proportion to out-of-state milk than they would purchase without such rebates. As a consequence of such practice one would expect a reduction in the amount of milk being shipped into Pennsylvania. We think these are permissible inferences, at least at the "complaint" stage of this proceeding.

Damage to plaintiff is alleged to be an amount equal to the rebates paid to the processors. Such rebates directly affected plaintiff because the contract under which he furnished milk to his co-operative provided that his milk was to be disposed of by Erie-Crawford to the best possible economic advantage and the net proceeds of all money received by Erie-Crawford were to be paid to him as his interest might appear. Since the rebate payments reduced the amount Erie-Crawford had available to pay the producers, plaintiff's share of such amount was necessarily reduced.

We conclude that for pleading purposes at least, plaintiff has alleged injury in his business or property within the meaning of Section 4 of the Clayton Act. Cf. Chattanooga

Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 395-396, 27 S.Ct. 65, 51 L.Ed. 241 (1906); and see Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

Having alleged a conspiracy which affects interstate commerce and consequent damage, the plaintiff has stated a claim under Section 1 of the Sherman Act. The claim of a violation of Section 2 is also sufficient for pleading purposes since the tendency of the conspiracy alleged was to monopolize a part of the trade or commerce among the several states. We think that plaintiff is entitled to an appropriate opportunity to prove these charges.

II. *Interstate Shipment of Pennsylvania Milk*

As we read this claim asserted under Section 1 of the Sherman Act, Erie-Crawford and the other defendants are alleged to have conspired to suppress and eliminate competition in the sale of milk and other dairy products. The practice allegedly employed to implement the conspiracy was to ship Pennsylvania milk into certain surrounding states where milk assembly plants were located to receive milk produced in those states. Such milk was then shipped to the processors in Pennsylvania. By this roundabout way, the milk was allegedly sold to the processors at prices below those fixed by the Pennsylvania Milk Control law.

The district court judge felt, once again, that plaintiff was really alleging a violation of the Pennsylvania Milk Control Act, and was erroneously equating that charge with a violation of the Sherman Act. As we have previously noted herein, the decision as to the effect of state law on the practice alleged is not dispositive of the federal claim. Accord, Northern Securities Co. v. United States, 193 U.S. 197, 344-345, 24 S.Ct. 436, 48 L.Ed. 679 (1904).

The district court also found, despite the allegations of the amended complaint to the contrary, that the shipment

of milk out of and then back into Pennsylvania promoted, rather than restrained interstate commerce. First, we think it was inappropriate to make such a finding on a motion to dismiss. Moreover, while such activity may increase commerce, the Sherman Act does more than prohibit the reduction of interstate commerce. It also proscribes conspiracies in "restraint of trade or commerce." By use of the term restraint of trade, the Sherman Act forbids certain restraints on competition. See William Goldman Theatres v. Loew's Inc., 150 F.2d 738 (3rd Cir. 1945).

Plaintiff has alleged a conspiracy which restrains competition in the sale of milk. He, therefore, has alleged a violation of Section 1 of the Sherman Act, since a restraint of competition, as a matter of law, necessarily restrains commerce as that term is used in the Act. Since a conspiracy to suppress and eliminate competition tends to monopolize a portion of trade or commerce among the states, plaintiff has also set forth sufficient allegations to charge a violation of Section 2 of the Sherman Act.

Plaintiff has further alleged that the above conduct has caused specific economic injury to his business, which in turn, has prevented him from competing with Erie-Crawford in the marketing of milk. Such allegations are, for pleading purposes, sufficient to meet the requirements of Section 4 of the Clayton Act. We find this claim sufficient to withstand a motion to dismiss.

III. *Boycott*

Plaintiff alleges that the defendant processors have, pursuant to a conspiracy with Erie-Crawford and the directors, restrained interstate commerce by refusing to purchase milk from any source other than those approved by Erie-Crawford. In furtherance of this conspiracy, the processors refuse to deal directly with the producers, thereby forcing the producers to furnish their milk to Erie-Crawford for disposition.

The district court judge, in his disposition of the complaint, did not discuss this allegation. It is our opinion that plaintiff has here stated the elements necessary to set forth a cause of action under Section 1 of the Sherman Act.

The fact that the "boycott" allegations relate only to activities of the Pennsylvania milk industry occurring wholly within the State of Pennsylvania is immaterial. If either the source or the application of the restraint is intrastate, the question is still whether its necessary effect is to stifle or restrain trade or commerce among the States. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949).

Having alleged a conspiracy to boycott certain milk produced in Pennsylvania, we believe plaintiff has stated a claim under Section 1 of the Sherman Act. Since such conduct may tend to monopolize a part of the trade or commerce among the several states, appellant has also stated a claim under Section 2 of the Sherman Act.

Plaintiff alleges he is directly damaged by the boycott because it forces him to furnish milk to Erie-Crawford and restricts the possibility of disposing of it directly in the open market. Since Erie-Crawford grants rebates to processors purchasing Pennsylvania milk, the amount which plaintiff receives from Erie-Crawford is less than he believes he could receive on the open market sale of such milk. Although the evidence may ultimately show that appellant's damage is not a direct result of the alleged boycott, we believe that for pleading purposes he has stated a damage claim under Section 4 of the Clayton Act. Compare, Roseland v. Phister Mfg. Co., 125 F.2d 417, 139 A.L.R. 1013 (7th Cir. 1942).

We therefore conclude that the district court should not have dismissed Count I of the amended complaint with pre-

judice for failure to state a claim.[8] We might add that if plaintiff feels our construction of the claims asserted under Count I does not encompass all those intended, he should apply to the district court for leave to amend to assert them.

We recognize that the confused and obscure quality of many of the allegations of the complaint may understandably have influenced the district court's decision, particularly since it had granted leave to file an amended complaint. But the subject matter of the lawsuit is too important to allow such prejudicial consequences to flow from imprecision in pleadings. We note that the record shows that the defendants also filed an alternative motion below for a more definite statement. It was not reached by the district court. We therefore are not called upon to express an opinion as to the merits of that motion.

Count III of the amended complaint alleges that defendants violated Pennsylvania law by fraudulent conversion of plaintiff's money, by tortious interference with plaintiff's advantageous business relations and by violations of the Pennsylvania Milk Control Act. Jurisdiction is alleged to be pendent to the antitrust violations asserted in Count I. The district court dismissed Count III on the grounds that the federal claims were insubstantial; that the subject matter did not bring the Count within the court's pendent jurisdiction and; that if it did, the Count should nevertheless be dismissed pursuant to an exercise of its sound discretion.

In 1966 the United States Supreme Court illuminated the pendent jurisdiction concept by its opinion in United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d

[8] The defendant Sterling Milk, Inc. seeks to have the dismissal upheld as to it on the ground that no specific damages are claimed from it in the amended complaint. We think the resolution of this contention at this stage of the proceedings would be premature.

218. In liberalizing the concept of pendent jurisdiction it said:

> "Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority • • •,' U.S.Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. [case cited] The state and federal claims must derive from a common nucleus of operative fact. But, if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." 383 U.S. at 725, 86 S.Ct. at 1138, footnotes omitted.

Keeping in mind that the district court decided this matter on a motion to dismiss the amended complaint, we must first consider the allegations to see whether the court below was correct in concluding that pendent jurisdiction power was absent. As the court noted in *Gibbs*, this matter is ordinarily resolved on the pleadings. We have decided herein that Count I sets forth a claim under the Sherman Act. Consequently, we must disagree with the district court's holding that no substantial federal claim is asserted.

Nor, at this stage, can we agree with the district court that the subject matter of the federal and state claims do not bring this Count within the court's pendent jurisdiction. The court below seemed to believe that in order to invoke pendent jurisdiction both the federal and state claims must derive from a common nucleus of operative facts and an invaded right which is common to both. We think this is too

narrow an approach to the issue, particularly in the light of the discussion in the *Gibbs* case. A right allegedly violated in a Sherman Act case and a right allegedly invaded under the common law may well have a common factual basis although the source of the "right" is different. Such a case is not automatically inappropriate for determination in a single trial. Certainly the fact that different remedies may be involved in disposing of the claims does not alter this conclusion.

Since we think the district court had the power to entertain Count III under its pendent jurisdiction, we next consider whether, in the exercise of a sound discretion as is permitted by *Gibbs*, it was nevertheless justified in dismissing the claim. We shall consider the reasons given by the district court and our evaluations thereof.

1. The district court "found" that the federal claim, to which the state claim was sought to be joined, was insubstantial. We have of course now held to the contrary.

2. The court's second ground for its decision was the fact that the allegations of Count III were based solely on a state claim asserted against certain non-diversity defendants. We fail to see how this ground is, in and of itself, sufficient to justify a refusal to exercise pendent jurisdiction. The situation mentioned is quite common in pendent jurisdiction matters and is, indeed, the reason why pendent jurisdiction is invoked.

3. The district court "determined," apparently from a reading of the amended complaint, that the state claim actually constituted the basis of the claims in all the Counts. The district court "found" that it was "clear" that the supposed federal questions were "appendages or vehicles employed to bring the state claim under the jurisdiction of a federal court." While we have no doubt that under the *Gibbs* case the propriety of asserting pendent jurisdiction remains open throughout the litigation, we think that the "findings" here made solely on the basis of the amended complaint were unwarranted.

We conclude that the judgment granting the motion to dismiss Count III must be reversed. In view of the posture of the case before the district court, we think the court lacked an acceptable basis for exercising its discretion to refuse to entertain the pendent jurisdiction claim. We emphasize that the various factors relevant to the exercise of discretion with respect to Count III will continue to be appropriate matters for consideration by the district court. United Mine Workers v. Gibbs, above.

Finally, we consider the challenge to the judgment of the district court dismissing the amended complaint insofar as it attempted to state a class action.

We are met at the outset by defendants' contention that the district court's class action ruling is not before this court for decision because no appeal was taken from its dismissal. Defendants contend that plaintiff is the only one who filed a notice of appeal, and he appealed only as an individual and not in his capacity as representative of the alleged class.

A portion of the caption of the notice of appeal reads as follows:

> "Robert M. Knuth, on behalf of himself and all others similarly situated, Plaintiffs • • •."

The body of the notice then recites in part:

> "Take Notice that Robert M. Knuth, plaintiff above named, does hereby appeal • • • from the judgment • • •" [He then refers to all three counts of the amended complaint.]

We think a fair reading of the caption and body of the Notice of Appeal conveys the information that plaintiff was appealing all the rulings below, which included the class action ruling. Liberality of interpretation in such a matter is most desirable. Cf. Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); Donovan v. Esso Shipping Co., 259 F.2d 65 (3rd Cir. 1958).

We come then to the correctness of the district court's dismissal of the class action.

In granting the motion to dismiss the amended complaint insofar as it purported to assert a class action, the district court relied on the following analysis:

> "Of the 56 farmer-producers listed in Exhibit A, 15 subsequently filed affidavits withdrawing from the suit, and 83 other farmer-producers filed affidavits averring that they were members and stockholders of Erie-Crawford and did not wish to be represented by the plaintiff. The Ohio and New York farmer-members seem to be totally ignored (see f.n. 3, supra). Thus, considerable doubt is cast upon plaintiff's claim to represent the interests of the alleged spurious class, whether that class is 1200 or 56 Pennsylvania farmer-producers. Since we think it appears that plaintiff inadquately represents the class, we are constrained to follow the ruling of this District Court in the *Hayes* case and grant the motion to dismiss insofar as the Amended Complaint purports to state a class action."

We interpret the district court's language to mean that because 98 Pennsylvania farmer-producers filed affidavits either withdrawing from the suit or indicating that they did not want to be represented by plaintiff, sufficient doubt was thereby thrown on plaintiff's class claim to justify its denial at that point, and that was so regardless of the size of the class.

Plaintiff sought to represent a class consisting of approximately 1200 Pennsylvania producers. The court therefore had expressions from only a small percentage of the alleged total class. To the extent the decision as to the right to maintain this class action involved "numbers," the district court, in our view, had an inadequate factual basis for its conclusion. We think the use of the procedure provided by new F.R.Civ.P. 23(c) would have been more likely to have

provided trustworthy evidence for deciding whether, numberwise at least, the plaintiff could fairly and adequately protect the interests of the class. That rule calls for notice to the members and gives them an opportunity to decide whether or not they want to be included in the lawsuit. While the new rule was in effect at the time this issue was decided by the district court, it does not appear to have been considered. We think its use would be entirely feasible and would work no injustice.[9]

The district court, in granting the motion, also indicated that it was relying to some extent upon the fact that another judge in that district had by order dismissed the class aspect of a related anti-trust action.[10] The district court in *Hayes* disposed of the matter by an order which did not disclose the precise basis of its decision, and thus it is not particularly helpful here. We note further that an appeal from that order was dismissed by this court on motion. An examination of the grounds of the motion reveals that they related solely to jurisdictional objections. Thus, the merits of the class action aspect of the decision in the *Hayes* case were not reached by this court.

We therefore reverse the class action judgment without prejudice so that the Rule 23(c) procedure may be followed. The determination as to whether a class action is properly involved, and if so, the ambit of the class, can then be made in light of the more fully developed facts. Compare Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Deckert, 123 F.2d 979 (3rd Cir. 1941). The Supreme Court of the United States adopted this procedure with respect to the new Intervention Rule (Rule 24). Cascade Nat. Gas Corp. v. El Paso Nat. Gas. Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967). We think the *Cascade* approach is also appropriate here.

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[9] See Order, 383 U.S. 1031 (1966).

[10] Hayes v. Sealtest Foods, C.A. No. 65-1072.

The judgment of the district court as to Counts I and III will be reversed and the matter remanded for proceedings consistent herewith.

KALODNER, Circuit Judge (dissenting).

I would affirm the March 30, 1967 Order of the District Court dismissing Counts I and II of the appellants' Complaint for failure to state claims upon which relief can be granted, and dismissing Count III of the Complaint, without prejudice. I would do so for the reasons so well stated by District Judge Marsh in the Opinion which accompanied his stated Order.

This too must be said. Count III alleges conduct on the parts of the defendants in violation of the "Statutory and Common Law of Pennsylvania", and jurisdiction is alleged to be *pendent* to the antitrust violations asserted in Counts I and II. The District Court dismissed these two counts on the ground that they failed to state a cause of action, and further dismissed Count III on the grounds that pendent jurisdiction did not exist for that reason, and that, assuming the contrary, "consideration of it [Count III] should be refused in a proper exercise of judicial discretion." I can discern no basis for a holding that the District Court abused its discretion under the existing circumstances.

ON PETITION FOR REHEARING

Before HASTIE, Chief Judge, and MCLAUGHLIN, KALODNER, FREEDMAN, SEITZ and VAN DUSEN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

This is a petition for rehearing in banc on an opinion of this court dated May 3, 1968.

We decided, inter alia, that the district court erred in dismissing the class action aspects of the amended complaint. We reversed without prejudice and ordered the dis-

trict court to use the procedure provided by new F.R.Civ.P. 23(c). It was felt that this procedure was more likely to produce trustworthy evidence for the district court to use in deciding whether, "numberwise at least," plaintiff could fairly and adequately protect the interest of the class. Petitioner asserts that we erred in ordering the district court to apply the provisions of 23(c) to determine whether plaintiff fulfilled the 23(a) (4) requirement that "the representative parties will fairly and adequately protect the interests of the class." Petitioner further requests that if rehearing is not granted, the question of whether the inquiry into adequacy of representation is to be made under 23(c)(2) or 23(d)(2) should be clarified. While we deny rehearing in banc, we do agree that clarification of the class action aspect of the opinion is appropriate.

At the outset we affirm our belief that the use of F.R.Civ. P. 23, as amended Feb. 28, 1966, eff. July 1, 1966, is entirely feasible and will work no injustice in this case. We wish to make it perfectly clear that we were not finally deciding the "class action" issue. Thus, we direct that the district court's judgment dismissing the class action aspects of this case be vacated rather than reversed.

The district court will, at the appropriate time, decide the issue as to whether the action may be maintained as a class action. Consequently, our opinion reference to 23(c) should not be taken as an implied judgment that the action is maintainable under 23(b)(3). Nor was that language intended to be understood as precluding the use of some other notice procedure (e.g., 23(d)) to assist the district court in determining whether, numberwise, the plaintiff could fairly and adequately protect the interests of the class.

The petition for rehearing will be denied.

GERALD MCLAUGHLIN, Circuit Judge, votes to deny the petition for rehearing.

KALODNER, Circuit Judge, would grant the petition for rehearing.

APPENDIX D

ROBERT M. KNUTH, on behalf of himself and all others similarly situated, *Plaintiffs*

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, and others, *Defendants.*

Civ. A. No. 65-1328

United States District Court
W. D. Pennsylvania.

April 15, 1971.

Paul A. Simmons, Monongahela, Pa., for plaintiffs.

W. Walter Braham Jr., Frank L. Seamans, Clyde W. Armstrong, Henry E. Rea, Jr., Pittsburgh, Pa., Errol Fullerton, New Castle, Pa., for defendants.

OPINION

WEIS, District Judge.

"Milk and honey" sounds of sweetness and serenity in story and song but "milk", "Commission" and "Co-Op" in conjunction connote confusion, contradiction and controversy in this case in court.

This is a class action brought on behalf of approximately 300 of a total of 1200 farmers who were members of the Erie-Crawford Dairy Co-Operative Association during the years of 1957 to 1965. The defendants are the Co-Op itself, its individual directors who served during that period of time, and a number of dairies or dealers to whom Erie-Crawford made sales of milk during the period in question.

Erie-Crawford was an agricultural cooperative organized under the laws of Pennsylvania whose members and dairy customers, sometimes called "handlers", were primarily

from the Western Pennsylvania area, concentrated mainly in the Pittsburgh and Erie areas.

The plaintiffs, also designated a "producers", had consigned their milk to Erie-Crawford for sale to the various dairies and claim that as a result of rebates or refunds granted by the Co-Op to the various dairies, the class has been deprived of monies rightfully belonging to it.

Suit was filed on two theories, first, that of violation of the antitrust laws and second, that of a conversion based upon state law.

In earlier proceedings in this case, the Court of Appeals [1] determined that, at least from the standpoint of pleadings, the plaintiffs' allegations were adequate to set forth a claim under the antitrust laws and that this Court could exercise pendent jurisdiction over the count for conversion based on state law.

During the period of time in question, each of the plaintiffs sent his milk to Erie-Crawford in accordance with a form contract providing that the Association was to sell the milk to such parties and by such methods as the Board of Directors deemed to be to the best advantage of the farmer. Authority was also given to "pool" proceeds derived from the sale of milk consigned by other members and to authorize the deduction of certain overhead expenses by the Co-Op. The result was that each milk producer would receive the same adjusted price for his milk regardless of the dairies to whom sales were made, even if at varying prices.

In Pennsylvania the price of milk, both at retail and on sale from the producer to the dairy, is subject to regulation by the State Milk Control Commission.[2] Free and open competition in the industry, therefore, did not exist in Western Pennsylvania during the period under study.

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[1] 395 F.2d 420 (3d Cir. 1968).

[2] 31 Purdon's Statutes § 700j-101 et seq.

However, the Commission's authority and jurisdiction extended only to sales made in Pennsylvania by Pennsylvania farmers to Pennsylvania dairies. Milk sold by the Co-Op or its producers to customers outside the state was not subject to the milk control price nor was milk shipped into the Erie or Pittsburgh area from outside Pennsylvania subject to control by the Commission.

Western Pennsylvania milk farmers were adversely affected by economic conditions in the early 1950's which developed in this area as a result of the unrealistic prices set by the Milk Control Commission. The mandated price for Class 1 milk (the fluid drinking milk) was higher than that of the similar product which was available in the adjoining States of Ohio and New York.

During this same period, production rose substantially and consequently there were increasing quantities of milk in Ohio and New York which were available to Pennsylvania dairies at prices substantially below that set for the Pennsylvania farmers by Commission fiat.

Although the Commission regulations specified the minimum prices at which sales could be made to the dairies, the Co-Op nevertheless during this period by various methods lowered its prices so that they would be at a similar level to those available to dealers who purchased out of state. This was done by the use of "price adjustments", as the defendants say, or "rebates", as the plaintiffs choose to term the arrangements.

The method of varying the price and the amount of the reduction was accomplished in a number of different ways. However, in each instance the Co-Op would collect the entire amount called for by the Milk Control Commission schedule and then refund the amount of the agreed concession to the dairy by means of a check.

The total amount of the refunds granted by the Co-Op during the years in question totaled more than one and a half million dollars.

Not all of the customers of Erie-Co-Op were granted this price relief and the testimony disclosed that only those customers who complained of lower prices available from out of state producers were given favorable treatment. The reductions were not uniform and the Co-Op did not inform any of its customers, including participants in the arrangements, that some were being given financial preferences.

The refunds were terminated some time in 1965 when minimum price schedules were reduced by the Milk Control Commission and hearings by that body on complaints of the rebating practice were held. Suit was filed by these plaintiffs on December 8, 1965.

At the conclusion of plaintiffs' case, a motion of dismissal was granted as to the counts brought under Section 1 of the Sherman Act but the jury was permitted to pass upon the claim of conversion. Answers to special interrogatories were returned in favor of the plaintiffs against all of the defendants, finding that conversions had taken place, that actual damages had been incurred, and that the Pennsylvania limitation period of six years had been tolled. The plaintiffs have filed motions for a new trial and for summary judgment with respect to the dismissal of antitrust claim. The defendants have filed motions for new trial and judgment n. o. v. with respect to the count for conversion.

THE ANTITRUST COUNT

At the time the Court of Appeals considered the plaintiffs' case, there were allegations of three types of conduct violating the antitrust laws, arranged under these headings:

I. Rebates;

II. Interstate shipping of Pennsylvania milk;

III. Boycott.

The latter two of these counts were abandoned at time of trial and the plaintiffs proceeded only on the theory of rebate.

The Appellate Court's analysis of the plaintiffs' Complaint was that "the defendants conspired to fix the price of milk shipped into Pennsylvania by the use of rebates to the processors on milk produced in Pennsylvania and purchased by them from Erie-Crawford. * * * Rebates given solely on Pennsylvania milk allegedly result in the suppression and elimination of competition by preventing the free flow of milk in interstate commerce from sources outside the State of Pennsylvania into the State of Pennsylvania. The object of this alleged combination and conspiracy was to accomplish the raising, fixing, controlling, setting, stabilizing and affecting the price of milk shipped in interstate commerce." (395 F.2d 420, 423-424.)

It was because the plaintiffs failed to produce the facts to sustain these allegations that the dismissals of the antitrust counts were granted.

Unquestionably the plaintiffs did prove that rebates were given to various dairies, in fact this was conceded by the defendants. It seems clear, also, that while the practice of selling milk at prices less than those set by the Commission was contrary to state law, the granting of rebates in and of itself does not establish a violation of the Sherman Act. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2nd Cir. 1969), cert. den. 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777.

The plaintiffs failed to establish that prices were "fixed" within the meaning of the antitrust laws; evidence was lacking to prove that there was any restraint imposed upon interstate commerce; and there was no proof that the free flow of milk from sources outside Pennsylvania had been hindered or impaired by the price adjustments.

What the plaintiffs' case did develop was uncontradicted testimony that prices outside Pennsylvania were lower than those set by the Milk Control Commission and that as a result of this unnatural and unfavorable economic climate, Erie-Crawford lost two of its large customers in the early

1950's. In order to prevent the loss of all its markets and to meet competition, Erie-Crawford did agree to lower its prices to meet those offered by Co-Ops which sold milk produced in Ohio and New York. In no instance was there a showing that Erie-Crawford had undercut its rivals but rather it seems that it was content to meet the competition on equal grounds.

In a fact situation like this, to hold that a seller is helpless and must stand by watching its business being destroyed would be a perversion of the result sought to be obtained by the Sherman Act. The antitrust laws were designed to encourage competition and to prevent predatory action. To outlaw the action of the Co-Op in defending its markets by the time-honored and legal sanctioned method [3] of meeting competition would be to turn the shelter of the antitrust legislation into a weapon which would kill free enterprise instead of protecting and promoting it.

Plaintiffs argue vigorously that they proved "price fixing" but actually what they showed fell far short of what was required, because to agree upon a price with a customer in the absence of other circumstances is not within the legal prohibition. Decisional law has established that "price fixing" within the intent of the Sherman Act is either horizontal (dealing with arrangements among competitors) [4] or vertical (attempting to control the resale price).[5] Neither was present in this case.

The Co-Op was not a competitor of the plaintiffs but was simply their agent. It did not and could not attempt to con-

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[3] *See* Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991, 76 S.Ct. 545, 100 L.Ed. 856. Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970).

[4] *E. g.* United States v. Masonite Corp., 316 U.S. 265, 62 S.Ct. 1070. 86 L.Ed. 1461 (1942).

[5] Also known as resale price maintenance agreements. *E. g.* Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed. 2d 998 (1968).

trol the resale price of milk since that was already preempted by the Milk Control Commission nor indeed was there any evidence to indicate that any attempts were made in this direction. There was no evidence that any of the dairies had agreed among themselves to set prices at which they would purchase milk from Erie-Crawford. To the contrary, all the evidence was that each price adjustment was set by Erie-Crawford individually with the particular dairy involved without the knowledge of any others. The adjustments were not the same and obviously the Co-Op was attempting to grant the smallest concession necessary in order to retain the business of the particular handler.

There was no showing of any restraint upon interstate commerce. The mere fact that an inference might be drawn that because Erie-Co-Op met the price of out of state milk and that consequently some of it was not shipped into and sold in Pennsylvania does not establish an unlawful restraint upon trade in the circumstances of this case. To hold otherwise would be to legalize and sanction predatory activity by the out of state milk suppliers who could flood the Pennsylvania market with their product and remove the hapless Co-Op and its members from the ranks of effective competition.

Much of the problem in the case was brought about by the collision of two antithetic philosophies—free and open competition as espoused by the Sherman Act versus close and rigid supervision by the state via price control as set out in the Milk Control Law. Plaintiffs and defendants alike seek support in the particular statute which supports their position but both must struggle with the inconsistencies generated by the application of the incompatible legislative enactments.[6]

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[6] For a discussion of this problem in another case involving Pennsylvania Milk Commission imposed milk prices, *see* Morton v. National Dairy Products, 287 F.Supp. 753 at 763, 764 (E.D.Pa. 1968).

Although it might be thought to be implicit in the earlier ruling of the Court of Appeals that the plaintiffs have standing to recover damages under the antitrust laws, the full development of the facts which were brought about by the trial tends to cast some doubt upon that assumption.

There is a divergence of view expressed by case law as to the class of people which is entitled to invoke the provisions of the Sherman Act, with the not unusual caveat that much depends upon the factual background.[7]

One of the more recent cases is Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183 (2nd Cir. 1970), cert. den. 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971), which holds that the plaintiff must show a link indicating that his property loss was in the "target area" of the illegal conduct. The opinion in that case reads:

> "There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage. [citations]. And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. While any antitrust violation disrupts the competitive economy to some extent and creates entirely forseeable ripples of injury which may be shown to reach individual employees, stockholders or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages • • • Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the

[7] *See* Standing to Sue for Treble Damages under § 4 of the Clayton Act, 64 Col.L.R. 570.

'target area' of the defendant's illegal act." (page 187) [8]

As Judge Learned Hand put it in Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 295 (2nd Cir. 1958):

> "The action at bar will not lie because all claims under the Anti-Trust Acts rest upon wrongs done by the suppression of competition and must be initiated by a party whose commerce has been directly injured."

See also Harrison v. Paramount Pictures, Inc., 211 F.2d 405 (3rd Cir. 1954).

Here the concessions granted by the Co-Op were not to those in competition with the plaintiffs. If it be assumed, arguendo, that the effect of price reductions was to restrict to some extent the amount of milk flowing into Pennsylvania, this would not be a cause of harm to the plaintiffs but could only be a benefit by increasing their opportunities for sales.

The damages claimed by the plaintiffs were the amount of the rebates. This loss was suffered by the plaintiffs not in an attempt by the Co-Op to restrict its markets but only to protect their very existence.

The parties who might claim to be aggrieved because of the lowering of prices by the Co-Op would have been the out of state producers who were in the target area and who were the ones who could claim loss of sales because of this activity. Certainly the plaintiffs did not fall within this group.

Recognition of the difficulties that are involved in proving conspiracy requires that wide latitude must be given to

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[8] *See* comment on this case and a discussion of the "target area" concept by Milton Handler in The Twenty-Third Annual Trust Review, 71 Col.L.R. (1971).

a party in his effort to prove his allegations but nevertheless the fact remains that the burden here is still on the plaintiffs. There was no testimony whatsoever from which the jury could have been permitted to infer that there was any plan or conspiracy among the various dairies to force a reduction of the price at which the plaintiffs had to sell their milk. The plaintiffs did not prove the elements of conscious parallelism nor any facts from which conspiracy might fairly have been inferred.

Essentially, all that the plaintiffs' case developed was that the Co-Op reduced prices in order to meet competition. This is not in and of itself actionable within the Sherman Act. See Balian Ice Cream Co., Inc. v. Arden Farms Co., supra; Jones v. Borden Co., supra.

The granting of the motion to dismiss was required by the posture of the case on not one, but several grounds.

CONVERSION

It may seem anomalous that the very same conduct which may appear perfectly legal and blameless in the context of one statute may nevertheless expose the defendants to liability and damages when viewed against a different backdrop. However, this is not unknown to the law and it was not surprising that when the question of conversion was submitted to the jury, it found adversely to the defendants as it could properly do on the evidence submitted to it.

Conversion has been defined as "an act of willful interference with the dominion or control over a chattel, done without lawful justification, by which any person entitled thereto is deprived of its use and possession." 37 P.L.E. Trespass § 82. See also Cenna v. United States, 402 F.2d 168 (3rd Cir. 1968). Motive or intent, good faith or mistake of law or fact,[9] leading to erroneous belief of right

[9] *See* Morissette v. United States, 342 U.S. 246, 270, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

of possession are not defenses. The theory of conversion is based on the general principle that a person is entitled to his property and if another mistakenly or otherwise interferes with the possession of that property or disposes of it without consent of the owner, he is entitled to have it returned nevertheless.

Pearl Assurance Company v. National Insurance Agency, 151 Pa.Super. 146, 30 A.2d 333 held that under Pennsylvania law money may be the subject of conversion. That case dealt with an assertion by an insurance company that its agent had converted premiums which had been collected from various assureds. The Superior Court said:

> "The obligation resting on the defendants was to collect the premiums and when collected to pay over the amount so collected less an agreed percentage to compensate defendants for their services. The money so collected by defendants, over and above the percentage deductible as compensation for services, never became the property of the defendants, but at all times was the property of the plaintiff insurance company. The transaction totally negatives any idea of a sale on credit of the policies to the defendants or either of them. They never had any property in them." (page 156, 30 A.2d page 337).

In this case the claim is based upon the premise that the milk was consigned to the Co-Op for sale with the understanding that when payment was received from the buyers, Erie-Crawford was to deduct the amount necessary to meet the agreed overhead charges and pay the remainder to the farmer. When the Co-Op did not remit all of the money but instead rebated part of the funds to the handlers, this constituted a conversion, according to plaintiffs, because they had not agreed to the refund. The jury specifically found that there had been no consent and that a conversion in fact had occurred.

The defense is that the milk was sold to the dairy on the condition and with the explicit understanding that part of the price would be returned to the buyer. It is argued, therefore, that the plaintiffs never had any property interest in the amount which was subject to refund because this money had been entrusted to the Co-Op by the dealer only for the purpose of compliance with the Milk Commission price schedule. Erie-Crawford says further that the consignment contract which required sales by the Co-Op "to the best advantage of the producer" was authorization to proceed in this manner.

The jury was instructed that every contract must be performed in accordance with the law and when the farmers turned over the milk to the Co-Op, it was with the implied condition that the sale be at the legal price. Further, the Court charged that it was contrary to law for Erie-Crawford to sell to a dairy agreeing to give a rebate, that any agreement to refund part of the purchase price was illegal, and could not be enforced by the dairy involved.

Defendants contend that this instruction was not only erroneous but prejudicial as well.

The Pennsylvania courts have had occasion to pass on various attempts to evade the price structure set by the Milk Control Commission in Pennsylvania and have been firm in refusing to permit any subterfuge. Thus, in Milk Control Commission v. McAllister Farm Dairy, 384 Pa. 459, 464, 121 A.2d 144, 147, the Supreme Court of Pennsylvania said:

> "By the cleverly conceived plan of rebates through redemption the actions of the appellant were a plain and simple circumvention of the Commission regulations and of the court's order that milk be not sold below the minimum prices. To have found otherwise than the court did here would have been deliberately to close its eyes to the actual facts."

In Milk Control Commission v. Rieck Dairy Division, 193 Pa.Super. 32, 37, 163 A.2d 891, 894 (1960), the Court said:

> "The motive is not important. It is the effect of the transaction which determines whether it constitutes a method or device to sell milk at a price less than the minimum set by the Commission * * *.
>
> "The methods and devices whereby milk can be sold at a price less than the minimum fixed by the commission are as unlimited as the genius of man * * *.
>
> "Milk control is found upon price control. As soon as dealers find a method or device to break down the commission's control over the price actually being paid, milk control will become chaotic, and soon nonexistent. The legislature understood this. It is evident from reading Section 807 of the Milk Control Law, supra, that it attempted, by every conceivable means, to close every 'loop hole' which would enable one dealer to obtain a price advantage over another."

In Shearer's Dairies, Inc. v. Pennsylvania Milk Control Commission, 191 Pa. Super. 574, 577, 159 A.2d 268 (1960), it was said:

> "No matter how far we follow the maze of corporative activities and involved contractual relationships, it will bring us back to this procedure, which, in our opinion, constitutes a device to sell milk at a price less than the minimum established by the commission, and is in violation of section 807, supra, of the Milk Control Law. Neither the ingenuity of the contract, nor the intricacies of the corporate structure change this transaction into anything but such a device."

The statute is quite clear that no method is lawful by which milk is sold at a price less than the minimum applic-

able, whether by rebate, or otherwise.[10] Consequently, the defendants are estopped to invoke their illegal agreement with the dairies in order to show that the plaintiffs had no property in the amount of money which was refunded. There is no doubt that before any specific rebate was made, the farmer had a legally enforceable right as to the funds in the hands of the Co-Op as contrasted with the dairy which would have been barred by its violation of the Commission regulations.

There was no question of fact to be submitted on this issue, the interpretation of the statute being one for the Court and not for the jury. It seemed to be desirable to explain to the jury the basis for the ruling, particularly in view of the fact that this trial had taken some five weeks to try, that there had been innumerable references to the Milk Control Act, to the prices set by the Commission, and to rebates.

To state that the action of the Co-Op in refunding the money was illegal was not to characterize it as criminal, as

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[10] § 700j-807.

"After the commission shall have fixed prices to be charged or paid for milk * * * , it shall be unlawful for a milk dealer or handler or producer, knowingly or unknowingly, or any other person knowingly * * * to sell * * * deliver * * * make available on consignment or otherwise * * * buy * * * receive * * * offer to sell or deliver * * * purchase * * * milk at any price below the minimum price * * * applicable to the particular transaction.

"No method or device shall be lawful whereby milk is bought * * * sold * * * handled on consignment or otherwise * * * at a price less than the minimum price applicable to the particular transaction, whether by * * * discount * * * rebate * * * extension of credit * * *

"It shall be unlawful for any milk dealer or handler, knowingly or unknowingly, or any other person knowingly * * * to * * * sell * * * deliver * * * buy or receive or handle on consignment * * * milk at a price computed upon false or erroneous weight, * * * butterfat test, grade, classification, or at a price from which have been made deductions, not authorized by law * * *"

defendants assert, nor did the definition amount to a directed verdict of conversion. Whether the plaintiffs had knowledge of the activities of the Co-Op and whether they consented to the price adjustments were still issues of fact to be determined and the jury was told that there would not be a conversion in the event of positive findings to these questions because the element of unauthorized acts of dominion over the property would be lacking.

The instructions containing the Court's interpretation of the Milk Control Act were necessary to present the issues to the jury in unequivocal fashion, particularly since the testimony of the defendants' expert appeared to imply that economic necessity might justify a violation of the state law.

PENDENT JURISDICTION

Defendants also contend that once the antitrust matter had been dismissed the Court should have refused to exercise pendent jurisdiction over the conversion count. However after a case has been waiting for years to reach the courtroom and then testimony had been taken for several weeks, sound judicial administration dictates that the trial continue to a conclusion. Furthermore, it would not simply be a matter of remanding to the state court or to the Milk Control Commission to proceed to a conclusion because in those forums the statute of limitations could be raised as an almost insurmountable defense to the plaintiffs' cause.[11] Indeed, it would probably have been an abuse of discretion not to conclude the case.

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[11] At oral argument on the post trial motions some of the defendants agreed that if the matter were remanded to the Milk Control Commission in conformance with the Act of 1806—*infra*, they would waive the Statute of Limitations. This concession was not made during the trial, however.

LIABILITY OF THE INDIVIDUAL DIRECTORS

The jury found that all of the defendants, including the directors of the Co-Op, individually, were liable in conversion. The charge to the jury permitted such a result as to the directors if it were determined that they had knowledge amounting to acquiescense or that they participated in the rebating operation.

The question of the personal responsibility of the directors in this case is a difficult one.

The president of the corporation during most of the period in question, one John Barney, was a salaried employee who actually performed the negotiations with all the dairies with the exception of a few instances when Howard Yost, the vice president, was substituted. Barney apparently was a forceful individual with long experience in the field of milk marketing, including service on the Milk Control Commission. It was obvious that he was the dominant force in the operation of the Co-Op both in day to day activities as well as long range policies. The idea of rebating apparently was his—at least insofar as it was carried out by Erie-Crawford.

It was Barney who met with the representative of the various dairies and bargained for the price adjustments—it was he who instructed the employees of the Co-Op to issue the refund checks—it was he who determined the formula to be used in calculating the price reductions and, apparently, he also had some conversations with members of the Milk Control Commission about the situation.

By contrast, the membership elected the directors who were farmers not participating in the day to day operation of the Co-op but who only met monthly to review operations generally. For this service they received a fee of $7.00 per meeting plus an allowance for mileage. It was uncontroverted that none of the directors profited personally from any of the conversions.

The director-defendants admitted candidly that they knew of the price adjustments, the rebating, and that they approved of the policy because they thought there was nothing else that could be done to preserve Erie-Crawford's markets.

In considering the legal problem involved, it must be observed at the outset that the standard of duty between a director and the corporation is not applicable because here the plaintiffs are in the position of third parties who seek damages for their personal loss, rather than reimbursement on behalf of the corporation. There appear to be no special circumstances in this case which would require the individual farmers and the directors to deal other than at arms length. Binns v. Copper Range Company, 335 Pa. 257, 6 A.2d 895 (1939); Imbrie v. Community Loan Company, 131 Pa.Super. 398, 200 A. 149 (1938).

As is not unusual, no Pennsylvania decisions clearly rule the issue raised by the facts in this case. One basic principle does emerge from a study of the cases, however—that being that a director is not liable for the tort of a corporation unless he "knowingly participates in a wrongful act." Chester-Cambridge Bank & Trust Co. v. Rhodes, 346 Pa. 427, 31 A.2d 128 (1943).

In Martin v. Wood, 400 F.2d 310, 314 (3rd Cir. 1968), the Court in applying Pennsylvania law held that neither the president nor vice president of a company was individually liable for an employee's personal injuries when neither of the officers "were actually present at the time of the accidents nor had they been in any way physically connected with the operations in the blast furnace area."

Zubik v. Zubik, 384 F.2d 267 (3rd Cir. 1967) refused to fasten personal liability upon a director for loss resulting from the collision of a barge which had been swept from its moorings, even though it appeared that the defendant had some actual knowledge of the dangerous conditions on the river existing before the breakaway. The

Court rested its decision on the fact that others in the corporation on whom the defendant relied had actually done the mooring and were aware of conditions on the barge and the river.

Apparently the leading case in this state dealing with a director's accountability for conversion is Cohen v. Maus, 297 Pa. 454, 147 A. 103 (1929). There the court declined to attach legal responsibility to directors who had no actual knowledge of the conversion but could have learned of it by examination of the corporation's books. An additional problem was discussed, similar to our present case, when the Court said:

> "The situation would however, seem to be different so far as the defendant Maus is concerned. He was not only a director, but also general manager of the corporation. He not only knew of the sale of the merchandise to plaintiffs, but actually made it. While it is earnestly argued that he did not participate in the resale of their goods and in the conversion, we have reached the conclusion that this question is sufficently doubtful to warrant its fuller investigation on another trial * * * If Maus actually converted plaintiff's goods, he would be personally liable to them notwithstanding that the proceeds went to the corporation and not to him." (page 457, 147 A. page 104.)

It is significant that the Court seemed to require actual participation in the sale and that mere knowledge of the transaction was not enough.

Then we come to the case of Fisher v. Rose, 319 Pa. 446, 181 A. 507 (1935) which the opinion says is anomalous. There the individual defendant was said to have converted certain stock which had been pledged to the corporation of which he was the president. Conceding that the defendant personally had made the sale, the Court said:

> "Under the existing circumstances, however, no inference can be drawn that Rose [the defendant] was

> acting other than on behalf of his company; certainly we cannot assume such to be true in the absence of specific and direct averment that it was the fact. Rose's acts were therefore, in legal contemplation those of the company, for which he is not, individually, responsible." (pages 447-448, 181 A. page 508)

While it is true that other jurisdictions might agree with the jury's finding in the case at bar,[12] Pennsylvania decisional law indicates that nothing short of direct participation will impose personal liability on a director in the type of circumstance with which we are concerned here. That essential factor was not present and therefore judgment n.o.v. will be entered for the individual defendants.

Defendants' brief concedes that since Yost participated directly, he is not entitled to judgment n.o.v. Barney died before trial commenced and his estate was not made a party to the suit.

THE ACT OF 1806 AND ITS APPLICATION TO THIS CASE

At the trial and in post trial motions, the defendants contended that the Act of 1806, 46 Purdon's Statute § 156, denied jurisdiction to the court as to a matter encompassed within the Pennsylvania Milk Control Law. The Act reads:

> "Acts of assembly to be strictly pursued. In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

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[12] *Cf.* Armour and Company v. Celic, 294 F.2d 432 (2nd Cir. 1961). *See also* Fletcher, Cyclopedia Corporations §§ 1140, 1142.

Defendants claim that this statute requires the plaintiffs to pursue their remedies against the milk dealers and Erie-Crawford before the Commission exclusively, citing the broad statement of legislative policy in the Milk Control Law, 31 Purdon's § 700j-301:

> "The board is hereby declared to be the instrumentality of the Commonwealth for the purpose of administering the provisions of this act and to execute the legislative intent herein expressed, and it is hereby vested with power to supervise, investigate and regulate the entire milk industry of this Commonwealth, including the production, transportation, disposal, manufacture, processing, storage, distribution, delivery, handling, bailment, brokerage, consignment, purchase and sale of milk and milk products in this Commonwealth, and including the establishment of reasonable trade practices, systems of production control and marketing area committees in connection therewith."

No decision of the Pennsylvania courts has held that the Milk Control Commission is the exclusive forum, nor indeed has any appellate decision been concerned with correlation between these two statutes.

The Statutory Construction Act of Pennsylvania, 46 Purdon's § 558, provides in part, that provisions of law decreasing the jurisdiction of a court of record shall be strictly construed.

The Milk Control Act itself does not contain any flat statement purporting to vest exclusive jurisdiction in the Commission but defendants point to § 1005, which says in part:

> "Appropriate proceedings against any milk dealer [13] violating this act * * *, may be instituted before the

[13] During the period from 1957 to 1965, a cooperative was considered a producer (§ 103). After December 15, 1965, by virtue of an amendment, a cooperative was considered a "dealer" when it had milk on consignment which it sold to dealers.

> Board by any producer to whom the lawful price of milk has not been paid or to whom such price has not been fully paid * * *"

However, we think it is not without significance that the permissive "may" is used rather than "shall" and there is no proviso to prohibit action in the courts. Furthermore, § 1003 provides in part:

> "* * * any person * * * may institute such action at law or in equity as may appear necessary to enforce compliance with any provision of this act, or to enforce compliance with any rule, regulation or order of the Board * * *"

The defendants' position is not supported by the wording of the Milk Control Law and far more than mere inference is required to oust the jurisdiction of the common law courts over one of its traditional forms of action. Section 1005 does not provide an exclusive remedy but merely an additional one.

THE STATUTE OF LIMITATIONS DEFENSE

The count for conversion was filed in this Court on May 31, 1966 but some of the transactions for which the plaintiffs make claim antedated May of 1960, beyond the Pennsylvania 6 year Statute of Limitations.

While the answer to an interrogatory found that the limitation period had been tolled, we conclude that plaintiffs failed to produce adequate evidence to allow submission of this matter for jury consideration and that the defense must be sustained.

The case of Overfield v. Pennroad Corporation, 146 F.2d 889 (3rd Cir. 1944) involved a suit by stockholders against the directors of their corporation. In discussing avoidance of the statute of limitations, the Court of Appeals said:

> "The plaintiffs say, however, that there was concealment and such concealment as would toll the running of

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> the statute under Pennsylvania law. We are confronted at the outset, however, with the proposition, laid down over and over again in the Pennsylvania decisions that the concealment which tolls the statute must be in an affirmative, independent act of concealment; mere silence or nondisclosure, even by corporate officials is not enough. The time at which it takes place is immaterial whether before, contemporaneous with or subsequent to the act, complained of. But independent act, 'affirmative efforts to divert, mislead, or prevent discovery' there must be." (page 896)

In a more recent opinion, Walters v. Ditzler, 424 Pa. 445, 227 A.2d 833, 835 (1967), the Supreme Court of Pennsylvania reviewed the requisites for tolling the statute:

> "Presently pertinent are certain well settled legal principles: (a) mere mistake, misunderstanding or lack of knowledge do not toll the running of the statute of limitations: [citation] • • • (c) the fraud which will toll the statute and effect and estoppel need not be fraud in the strictest sense, i.e., inclusive of an intent to deceive, but may be fraud in the broad sense, i.e., inclusive of an unintentional deception: [citation]; (d) an estoppel becomes operative only in clear cases of fraud, deception or concealment."

See also Iancaponi v. New Amsterdam Casualty Co., 258 F.Supp. 880 (W.D.Pa. 1966) aff'd 379 F.2d 311 (3rd Cir. 1967) cert. den. 389 U.S. 1054, 88 S.Ct. 802, 19 L.Ed.2d 849 (1968).

In this trial there was no testimony whatsoever of any activity by the dairies which could qualify as affirmative acts which prevented discovery by the plaintiffs. There had been no contact between the producers and the handlers, no requests for information, no knowledge of the dealers' accounting procedures, indeed not even the op-

portunity on the part of these dairies to deceive the farmers.

While it is contended that the jury could consider the fact that Sealtest records for the years of 1957 and 1958 were no longer available at the time suit was filed in 1965, nevertheless the plaintiffs did not and could not show how this affected them. Consequently, it was error to have permitted the jury to pass upon the question when there was no evidence of affirmative acts of misleading or concealment by the dairies directed toward these plaintiffs.

With respect to the individual directors, again, a similar lack of proof is evident.

The plaintiffs asserted that the financial statements which were used as a basis for reports at the annual meeting did not contain any mention of rebates or price adjustments. Also Mr. Knuth testified that in June, 1965 at a Board meeting, he requested an opportunity to view the books of Erie-Crawford but was told that directors were too busy at that time, although he was invited to return when a meeting was not in progress. Knuth did not do so. This evidence fails to meet the test of acts intended to deceive, conceal, or misrepresent which the Pennsylvania Law requires to be proved by evidence that is clear and precise.

As additional evidence against the Co-Op, the producers point to testimony that the Erie-Crawford's accountant made the computation of the various price adjustments in a special notebook which he kept in a separate drawer in his desk and that the corporate records did not clearly reveal the rebates. However, there was no testimony that any plaintiff was deprived of the opportunity to view the corporate records or that any request for explanation or interpretation was ever made.

While there was testimony that the price adjustment problem was presented to one or more annual membership

meetings, it was never clearly established in which year or years this was done.

The evidence on this issue produces the impression of an organization which was not particularly interested in making the price arrangements known to the public or to all of its customers and, accordingly, did not go to any pains to draw attention to the situation. This falls short of the requirements of Pennsylvania Law that there be affirmative efforts at concealment. The silence or nondisclosure which was shown by the plaintiffs is not sufficient to overcome the policy of Pennsylvania law to enforce the limitation period in all but severely restricted situations. The Statute of Limitations must be considered a valid defense for all defendants and not a proper matter for jury determination.

CONDUCT OF PLAINTIFFS' COUNSEL

This was a lengthy trial, tenaciously contested by the lawyers for all parties. There were numerous side comments by counsel during the questioning of the witnesses, mostly by the attorney representing the plaintiffs. Counsel were cautioned by the Court on many occasions to desist but after a short period of compliance, the chatter would commence again.

The defendants have cited numerous instances of alleged prejudicial comments by plaintiffs' counsel and it must be admitted that most were unnecessary and many were objectionable reflections on the credibility of witnesses or the value of certain testimony. Nevertheless, the cold record does not accurately reflect the atmosphere of the trial and many of the remarks in print appear stronger than they sounded in the courtroom. Although many of counsel's observations made in the guise of objections to evidence should not have been made in the presence of the jury, they were not actually prejudicial. We do not believe that the jury was influenced in favor of one party or another by the exchanges between the lawyers.

Complaint is also made that plaintiffs' counsel exceeded the bounds of fair comment in his summation when he spoke of "law and order", the necessity for all to obey the law, and what children were being taught in college. While the remarks were strong, they fairly met inferences and statements of the defendants' expert whose testimony conveyed an impression of willingness to condone statutory violation, if necessary, in the pursuit of financial profit. The defendants are in no position to complain of the plaintiffs' closing argument—which in this case we do not consider prejudicial.

EVIDENTIARY RULINGS

The defendants sought to produce evidence of statements by an accountant employed by the Milk Control Commission,expressing his views on the legality of the rebate procedures. An offer was made, also, to introduce a letter written by the Secretary of the Milk Control Commission, apparently giving tacit approval to the milk price adjustments procedures followed by the Co-Op. This letter said in part:

> "* * * we believe we stated that where a milk dealer paid a producer for milk shipped and the producer voluntarily and without suggestion, pressure, threat or duress, returned the portion of the money voluntarily, the transaction was completed as far as payment to producers was concerned and no violation of the law existed.
>
> "We still feel that this is a proper analysis in a particular situation."

The plaintiffs had originally asked for punitive damages but abandoned that claim as the trial got under way. The proffered testimony might have had some relevancy on the issue of good faith on the part of the defendants so long as the exemplary damage count was viable but when it was removed from the case, the reason for the introduc-

tion of the evidence was no longer applicable. The evidence would have had no further pertinency to the issues and might have resulted in confusion in the juror's mind as to the proper interpretation of the Milk Control Act.

Furthermore, it is apparent that the secretary's interpretation of the statute was in flagrant disregard of its plain meaning. In view of the strong language of the Supreme Court of Pennsylvania in the *McAllister* case, supra, (decided some 4 years before the letter), it is incredible that an official of the Commission would believe that return of part of the purchase price by a producer to a dealer did not violate the spirit and intent of the Milk Control Law. It strains credulity beyond the breaking point to accept as a reality of life a situation where a farmer would voluntarily and without suggestion, pressure, threat, or duress, return part of the money which he had received for milk which he had sold to a dealer. The evidentiary rulings on these points and others raised on post trial motions were not error.

MITIGATION OF DAMAGES

The jury was instructed that proof of a technical conversion, without more, entitled the plaintiffs to only nominal damages, that if any further sums were to be awarded, the burden was on the plaintiffs to establish actual loss, and that the defendants were entitled to show in reduction of damages facts or circumstances tending to reduce the amount required to compensate the plaintiffs.[14] The jury in answer to an Interrogatory found no reduction was to be made.[15]

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[14] 18 Am.Jur.2d, Conversion § 102.
89 C.J.S. Trover and Conversion § 180.

[15] "6. Are the defendants entitled to a reduction in the damages claimed by the plaintiffs?

Yes___ No √"

The case was to be tried on liability first, with damages to be determined thereafter by a Master in a series of computations. This arrangement was necessary because there are several hundred claimants involved and the amount of damage which each sustained must be determined on a number of variables including the quantity of milk sold by the Co-Op for the individual, the percentage of butterfat adjustment which would be applicable, incentive arrangements for sale of milk during certain seasons of the year, etc. A corporation of this magnitude would have been impracticable for a jury.

On the other hand, as a class, the plaintiffs contended that their loss amounted to the total of the rebates paid to the dairies. The defendants contended that there was in fact no such loss because it would have been impossible for the plaintiffs to have sold their milk on the open market at any better price than that which the Co-Op secured.

To buttress their position, the defendants submitted extensive marketing data, complete with charts and the testimony of an expert witness. It was against this background of the damages which might be available to the class as a whole that the jury was permitted to determine if the plaintiffs were entitled to nominal damages, the full amount of the rebates as they claimed or some lesser amount which might be determined in conjunction with the defendants' evidence on market conditions.

> "In an action conversion, although the plaintiff is generally entitled to recover the value of the property converted, the defendant is permitted to show the existence of facts which would make it unjust to allow the plaintiff to recover such amount." 18 Am.Jur.2d, Conversion § 102.
>
> "As a general rule defendant is entitled to show in mitigation or reduction of damages any facts or circumstances which would tend to reduce the amount re-

quired justly to compensate plaintiff for the actual loss he has sustained as the proximate result of defendant's act." 89 C.J.S. Trover and Conversion § 180.

Here the jury determined that the plaintiffs were entitled to the full amount of their loss and this was in its province to do so.

The defendants contend that they were misled by the pretrial arrangements with respect to reference to a Master and were unprepared to meet the reduction of damages issue at the trial. However, the contention is not well taken. The defendants were thoroughly prepared on the issue of market conditions and produced such extensive and exhaustive evidence that it is difficult to conceive of any other testimony which could be found to have a bearing on the matter.

The evidence on this point was that which would apply to the class of the plaintiffs as a whole. It does not and is not intended to bar testimony on other matters of defense which might apply in the assessments of damages in individual cases, although, certainly, the matter of market conditions has been resolved by the jury's finding.

It may well be, as the plaintiffs contend that the defendants were not even entitled to have this matter submitted to the jury. However, we do think the question was fairly raised by the evidence and was within the jury's domain. The charge to the jury on this point was an accurate statement of the general law.

The defendants contend that it was error to submit Interrogatories on this point to the jury but it's difficult to follow this reasoning when it is noted that a favorable answer to the question would have been beneficial, but the failure to submit the issue would have deprived the defendants of an opportunity to substantially better their position.

The defendants also object to the interrogatory following which would have permitted a reduction in percentages,[16] claiming there was no basis for the jury's determination. The market conditions testimony, however, if accepted by the jury, could have furnished a guide and its findings would have been no more speculative than many items of damage which juries pass upon daily. In any event, since it was determined that no reduction was applicable, the objection is moot.

DAMAGES RECOVERABLE BY THE CLASS

In accordance with the opinion of the Court of Appeals suggesting consideration of the application of Rule 23, arguments were held and Orders were entered by this Court on January 22, 1969 and February 28, 1969.

The first Order determined that the matter should be handled as a class action, and the second required that a notice be given to each eligible member of the Co-Op, advising that he could be excluded from the class and participation in the suit if a request was submitted in writing and sent to the Clerk of the Court. Absent such affirmative action, those who were members of Erie-Crawford during the years in question would be considered as part of the class,[17] the notice adding, "the judgment entered, whether favorable or not, will be binding upon you and no other suit may be brought by you on the claims alleged in this lawsuit." The potential participants were further advised, "If the defendants are found to be liable to the class members, in order to recover any amount from them, you will be required to prove your specific damages."

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[16] "7. If the answer is 'Yes', indicate what percentage of reduction the defendants are entitled to. ....."

[17] They were also given the option of retaining their own attorney if that was desired.

Plaintiffs now assert that they should be entitled to recover all of the damages sustained by the class, even by those who had requested exclusion from the suit.

We reject this contention and hold that only the damages sustained by members of the class as presently constituted may be assessed against the defendants.

Plaintiffs' position is unsound in two respects. First, if the present members of the class wish to collect all of the damages sustained by all without distributing the shares to those who chose not to continue in this suit, then there would be unjust enrichment. The law of Pennsylvania, as in other common law jurisdictions, is that tort actions are brought for compensation for loss suffered. Absent punitive damages, no other recovery should be permitted. Second, if damages could now be awarded to those who had previously decided not to participate, the whole purpose of giving notice under 23(d) would be thwarted and the Rule would be in shambles.

The procedures of Rule 23 are designed to facilitate the disposition of litigation where large numbers of litigants are involved. It has already raised many practical problems and if the procedure is to continue to serve the purpose for which it was designed, it must be carefully utilized.

Professor Charles Alan Wright in his discussion of class actions, 47 F.R.D. 169, 181 said:

> "Critical to the entire operation of the revised rule is the effect of the judgment. It is clearly contemplated that every judgment in every class action will bind all of the members of the class, except for those who have asked to be excluded in a (b) (3) action.
>
> * * *
>
> "The absentee has an absolute right to be excluded from a (b) (3) action. If he does, and the judgment ultimately is favorable to the class, he should not be

entitled to rely on it as collateral estoppel, in those jurisdictions that departed from the requirement of mutuality for estoppel. To permit him to do this would make a mockery of the (b) (3) procedure, and would restore in a different form the 'one way' intervention that the amended rule was expressly intended to preclude. Notions of collateral estoppel are not so inexorable that a party who has affirmatively obtained exclusion from a judgment need be allowed later to claim the benefits of the judgment."

A fortiori, an excluded plaintiff should not be entitled to share in the damage award nor should a defendant who thought he was dealing with damages sustained by several hundred suddenly be required to meet those claimed by a thousand.

Finally, if there was any doubt, Rule 23(c) (3) provides: "The *judgment* in an action maintained as a class action under subdivision * * * (b) (3), whether or not favorable to the class, *shall include and specify or describe those to whom the notice* provided in subdivision (c) (2) *was directed, and who have not requested exclusion,* and whom the court finds to be members of the class." (emphasis provided)

Appropriate Orders will be entered.

APPENDIX E

Interrogatories to the Jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 65-1328

ROBERT N. KNUTH, on behalf of himself and all others similarly situated, *Plaintiffs*

vs.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, and others, *Defendants*

Interrogatories to the Jury

1. Were the plaintiffs deprived of money to which they had a right of possession by the payment of rebates? (Do not consider Rieck Dairy or Sealtest in answering this question).

YES___X___ NO_____

2. Did the plaintiffs consent to the granting of rebates to the handlers or dairies?

YES_____ NO___X___

If the answer is "Yes", indicate the date.

_____

3. Did the adjustment given to Rieck Dairy (Sealtest) deprive the plaintiffs of money to which they had the right of possession?

YES___X___ NO_____

4. Are the following officers and directors of Erie-Crawford personally liable for the conversion? (Answer as to each individual defendant).

	YES	NO
Charles Spaid	X	
Howard Yost	X	
John Hanas	X	
Russell Raybuck	X	
Milton Culbertson	X	
Donald Triscut	X	
Raymond Boyd	X	
Calvin Henry	X	
Roy Black	X	
Loran Mitchell	X	

If you answer either 1, or 3, or 4 "Yes", and 2 "No", please answer the following interrogatory:

5. Did the conversion of plaintiff's property by the defendants result in only nominal ($1.00) damages to the plaintiffs?

YES_____ NO__X__

If your answer is "No", please answer the following interrogatories:

6. Are the defendants entitled to a reduction in the damages claimed by the plaintiffs?

YES_____ NO__X__

7. If the answer is "Yes", indicate what percentage of reduction the defendants are entitled to: _____

8. Is the Statute of Limitations a defense as to events which occurred before May 31, 1960 as to any of the following defendants? (Answer "Yes" or "No" as to each).

	YES	NO
William Colteryhan & Sons	____	X
Erie Dairyland	____	X
Golden Crown	____	X
Golden Glow	____	X
A. H. Hilgendorf	____	X
Home Dairy	____	X
Lingerlight Dairy	____	X
Peninsula Dairy	____	X
Rieck Dairy	____	X
Schneider's Dairy	____	X
Snee Dairy	____	X
Erie-Crawford Dairy Co-Operative	____	X
Charles Spaid	____	X
Howard Yost	____	X
John Hanas	____	X
Russell Raybuck	____	X
Roy Black	____	X